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SIDNEY SEFTEL, THERESA SEFTEL, and MICHAEL LANDES, Counterclaim Defendants and Appellants, UTAH STATE TAX COMMISSION, CROSSROADS PLAZA ASSOCIATES, a Utah joint venture and general partnership, YOUNG ELECTRIC SIGN COMPANY, a Utah corporation, and OLYMPUS HILLS SHOPPING CENTER, LTD., a Utah limited partnership v. Capital City Bank, a Utah corproation : Brief of Respondent

Utah Court of Appeals

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Daniel W. Jackson; Attorney for Appellants.
Herschel J. Saperstein, Steven T. Waterman, Marco B. Kunz; Watkiss and Campbell; Attorneys for Respondent.

IN THE UTAH COURT OF APPEALS

SIDNEY SEFTEL, THERESA SEFTEL, and MICHAEL LANDES,

Plaintiffs and Appellants,

vs.

CAPITAL CITY BANK, a Utah corporation,

Defendant and Respondent.

CAPITAL CITY BANK, a Utah corporation,

Counterclaimant and Respondent.

vs.

SIDNEY SEFTEL, THERESA SEFTEL, and MICHAEL LANDES,

Counterclaim Defendants and Appellants,

UTAH STATE TAX COMMISSION, CROSSROADS PLAZA ASSOCIATES, a Utah joint venture and general partnership, YOUNG ELECTRIC SIGN COMPANY, a Utah corporation, and OLYMPUS HILLS SHOPPING CENTER, LTD., a Utah limited partnership,

Counterclaim Defendants.

Case No. 870312-CA

Argument Priority No. 14b

BRIEF OF THE RESPONDENT

Appeal from the Third Judicial District Court
In and For Salt Lake County, Judge Timothy R. Hanson

Daniel W. Jackson
The Walker Center, Suite 560
175 South Main
Salt Lake City, Utah 84101
Telephone: (801) 328-1800
Attorney for Appellants

Herschel J. Saperstein
Steven T. Waterman
Marco B. Kunz
WATKISS & CAMPBELL
310 South Main, Suite 1200
Salt Lake City, Utah 84101
Telephone: (801) 363-3300
Attorneys for Respondent

IN THE UTAH COURT OF APPEALS

SIDNEY SEFTEL, THERESA SEFTEL, and MICHAEL LANDES, Plaintiffs and Appellants, vs. CAPITAL CITY BANK, a Utah corporation, Defendant and Respondent.	)
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Daniel W. Jackson
The Walker Center, Suite 560
175 South Main
Salt Lake City, Utah 84101
Telephone: (801) 328-1800
Attorney for Appellants

Herschel J. Saperstein
Steven T. Waterman
Marco B. Kunz
WATKISS & CAMPBELL
310 South Main, Suite 1200
Salt Lake City, Utah 84101
Telephone: (801) 363-3300
Attorneys for Respondent

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Capital City Bank ("Capital City"), by and through its counsel, Watkiss & Campbell, submits this brief in response to the appeal from a partial final judgment and decree of foreclosure filed by Sidney Seftel, Theresa Seftel, and Michael Landes, Plaintiffs, Counterclaim Defendants, and Appellants ("Appellants").

JURISDICTION OF THE COURT OF APPEALS

The Utah Supreme Court has appellate jurisdiction over this appeal pursuant to Utah Code Ann. §78-2-2 (1987). On July 23, 1987, the Utah Supreme Court poured-over this case to the Utah Court of Appeals for disposition. Accordingly, the Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. §78-2a-3 (1987).

STATEMENT OF ISSUES ON APPEAL

1. Whether the district court properly granted summary judgment in favor of the Respondent since there was no genuine issue of material fact and whether Capital City was entitled to judgment as a matter of law?

2. *Whether the district court properly concluded that* the SBA was not an indispensable party to this action?

NATURE OF THE PROCEEDING

This proceeding before the Utah Court of Appeals is an appeal by Plaintiffs from a memorandum decision and partial final judgment and decree of foreclosure entered in the Third

Judicial District Court in and for Salt Lake County, State of Utah, by the Honorable Timothy R. Hanson. The judgment appealed from granted summary judgment in favor of Capital City dismissing all claims in the complaint filed against Capital City, R. 501, ¶ 13, and further granting judgment against Appellants and in favor of Capital City on the counterclaim in the amount of $293,319.64 plus interest after February 15, 1987, at 11 3/4% per annum compounded annually, R. 498, ¶ 2, and ordering foreclosure of the mortgages held by Capital City on the Appellants' real property. It is these decisions from which Appellants filed their Notice of Appeal. R. 405-406; 498, ¶ 4; 499, ¶ 6; 500, ¶ 8.

The district court also declared that Capital City's mortgages on the Appellants' real properties are superior to any liens claimed by the other Counterclaim Defendants: Utah State Tax Commission, Crossroad Plaza Associates, Young Electric Sign Company, and Olympus Hills Shopping Center, Ltd., from which no appeal has been taken. R. 499, ¶5 and 7; ¶ 501, ¶ 10. The district court specifically reserved the issues relative to the award and proper amount of attorneys' fees to be awarded to Capital City. R. 501, ¶ 14.

DETERMINATIVE STATUTES AND RULES

Rule 56, Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

1. On or about December 24, 1979, Bagel Nosh Intermountain, Ltd., a New York corporation (hereinafter "Bagel Nosh"), executed a Note (hereinafter "note") in favor of Capital City in the principal sum of $300,000.00, which note was executed by Sidney Seftel as Vice-President of Bagel Nosh. R. 3, ¶ 5; R. 25, ¶ 5.

2. As explicitly stated, the note was executed by Bagel Nosh to secure a loan in which the Small Business Administration (hereinafter "SBA"), an agency of the United States, is participating. R. 14.

3. Appellants were the officers, directors, and owners of Bagel Nosh. R. 107-115, 128.

4. On even date with the note, Appellants executed two absolute, unconditional, personal guaranties of the note in favor of Capital City. R. 20-21.

5. On even date with the guaranties, Appellants executed two trust deeds in favor of Capital City as collateral security for their guaranties. R. 37-39, 41-43.

6. The guaranties explicitly grant:

> [T]o Lender . . . the due and punctual payment when due, whether by acceleration or otherwise . . . of the principal of and interest on and all sums payable . . . with respect to the note of the Debtor . . ..
>
> * * * * *
>
> [G]rants to Lender full power, in its uncontrolled discretion and without notice . . . to deal in any

manner with the liabilities and the collateral, including . . . [p]ower:

(a) To modify or otherwise change any terms of all or any part of the liabilities or the rate of interest thereon . . . to grant any extension or renewal thereof . . . and to effect any release, compromise, or settlement with respect thereto:

* * * * *

(d) To consent to the substitution, exchange, or release of all or any part of the collateral . . ..

* * * * *

The obligations of the [Plaintiffs] hereunder shall not be released, discharged, or in any way affected, nor shall the [Plaintiffs] have any rights or recourse against Lender, by reason of any action Lender may take or omit to take under the foregoing powers. (emphasis added).

R. 20-21.

7. On or about March 30, 1983, Bagel Nosh, Capital City, and the SBA entered into a Loan Restructure Agreement modifying the terms of the note. R. 44-45.

8. The Loan Restructure Agreement was signed by one of the Appellants and provided for: (a) curing the existing default in payments on the note; (b) payment of a minimal amount on the principal indebtedness; (c) Bagel Nosh to submit monthly financial statements; (d) personal financial statements of Sidney Seftel and Michael Landes to be submitted; (e) a reduction in monthly payments from $5,557.50 per month to $4,000.00 per month; and (f) a reduction in the interest rate charged by one-half of one percent. R. 44-45.

9. Bagel Nosh filed a voluntary petition under Chapter 11 of the Bankruptcy Code on November 29, 1984. R. 5, ¶ 11; R. 25, ¶ 11.

10. As alleged by Appellants in their complaint, during the pendancy of the Bagel Nosh bankruptcy proceeding, Appellants, "as Guarantors," have been making monthly payments in the reduced amount on the note in favor of Capital City in accordance with the provisions of the Loan Restructure Agreement. R. 5, ¶ 14; and R. 25, ¶ 14.

11. At all times relevant to this action, Capital City has maintained and still maintains a perfected security interest, pursuant to Article 9 of the Utah Uniform Commercial Code - Secured Transactions, in all equipment, machinery, and other personal property of Bagel Nosh.

12. No authorized officer of Capital City or any person charged with the responsibility for administering the Bagel Nosh loan has at any time represented to any person that Capital City did not have or does not have an interest in the equipment of Bagel Nosh. R. 168-184.

13. On March 11, 1986, Appellants filed a complaint in the Third Judicial District Court of Salt Lake County, State of Utah, against Capital City asking the court to declare that Appellants were discharged from any obligations under their unconditional, personal guaranties. R. 2-21.

14. On April 1, 1986, Capital City filed an answer and counterclaim to Appellants' complaint. The counterclaim asked

the court to decree that the Appellants' guaranties and their trust deeds were valid obligations of Appellants, jointly and severally, and to judicially foreclose the trust deeds. The counterclaim also asked the court to declare that the interests of the Utah State Tax Commission, Crossroads Plaza Associates, Young Electric Sign Company, and Olympus Hills Shopping Center, Ltd., in Appellants' real property were inferior to the interests of Capital City. R. 24-45.

15. On April 24, 1986, Appellants served Requests for Admissions and Interrogatories on Capital City, R. 65, to which Capital City timely responded on May 27, 1986. R. 74.

16. On July 25, 1986, Capital City filed a motion for summary judgment on the issues in the complaint and the counterclaim and a memorandum of points and authorities in support thereof. R. 79-99, 100-102. As part of the record including the exhibits to Capital City's memorandum, Capital City submitted documentary evidence in accordance with Rule 56, Utah Rules of Civil Procedure, showing that it was entitled to summary judgment as a matter of law on each and every issue before the court. R. 34-45, 80-86, 105-192, 241-243, 250-252, and 283.

17. Accompanying the motion, Capital City filed a Notice of Hearing for the motion to be heard before the district court on August 11, 1986. R. 194-196.

18. Appellants requested and were granted a stipulation by Capital City to the time in which to respond and to obtain

affidavits in opposition to the motion with a continued hearing. R. 201-203.

19. On September 11, 1986, Appellants filed a Memorandum in Opposition to Defendant's Motion for Summary Judgment without any supporting documentary evidence or affidavits. R. 208-222.

20. The hearing on the motion for summary judgment was continued until October 6, 1986. R. 225-226.

21. On October 2, 1986, Appellants moved for a continuance of the hearing on the motion. R. 227-230.

22. On October 2, 1986, Judge Daniels of the district court continued the hearing on the motion to October 27, 1986, and granted Capital City lease to file a reply memorandum. R. 237-238.

23. On October 3, 1986, Capital City filed a reply memorandum in support of its motion with additional documentary evidence attached thereto. R. 241-305.

24. On October 27, 1986, the motion of Capital City was heard before the Honorable Timothy R. Hanson and the matter taken under advisement. R. 307.

25. After legal research and a careful review of the evidence, on February 4, 1987, Third Judicial District Court Judge Timothy R. Hanson issued a memorandum decision granting summary judgment in favor of Capital City on all issues in the complaint and the counterclaim. R. 308-313.

26. On May 20, 1987, Judge Hanson signed a partial final judgment and decree of foreclosure setting forth the terms

of the February 4, 1987 decision and foreclosing the mortgages on the real property of the Appellants. R. 378-384.

SUMMARY OF ARGUMENTS

I

The district court did not err in finding that no genuine issue of material fact precluded summary judgment, since Capital City produced uncontroverted evidence on each and every issue before the court. Capital City thus established entitlement to summary judgment as a matter of law. Appellants failed to submit any evidence to raise a genuine issue of material fact.

II

The district court in ruling in favor of Capital City correctly applied the law on all substantive issues before the court. Capital City established that Appellants admitted their liability under the guaranties and waived any claim of modification. Furthermore, the record evidences that even under state law, which is not the applicable substantive law, Capital City would be entitled to prevail.

III

The district court did not abuse its discretion in holding that the SBA was not an indispensable party. The Appellants' undisputed evidence shows that the SBA did not purchase any of the loan or receive a transfer of the note executed in favor of Capital City. Furthermore, the SBA

authorized Capital City in writing the right to enforce the obligations due from Appellants. The record thus supports the district court's ruling.

ARGUMENT

POINT I

THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF CAPITAL CITY BANK

Under Rule 56(c), Utah Rules of Civil Procedure,[1] a District Court may grant a motion for summary judgment if the record shows "that there is no geniune issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Id. The record before this Court shows that no genuine issue of material fact exists that would preclude summary judgment. Furthermore, the uncontroverted facts establish that Capital City is entitled to judgment as a matter of law.

A. Capital City Satisfied Its Burden of Proof, but Appellants Failed to Satisfy Their Burden

The Utah Supreme Court has set forth the respective burdens of the parties in establishing a case for summary judgment.

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[1] Appellants seek to have this Court apply federal law to both substantive and procedural issues. It is well settled, however, that the Utah Rules of Civil Procedure govern the procedure in civil actions in all Utah courts. Rule 1, Utah Rules of Civil Procedure. See also, Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Thus, a motion for summary judgment in a Utah court is governed by the procedural requirements of Rule 56, Utah Rules of Civil Procedure.

In Franklin Financial v. New Empire Development Co., 659 P.2d 1040 (Utah 1983), the Court held that the proponent of a motion for summary judgment has the burden of establishing a prima facie case for summary judgment. Once the proponent has made a prima facie case, the opponent of the motion must raise material factual disputes in order to avoid the court's concluding that there are no disputed factual issues. Id. at 1044. See, Rule 56(e), Utah Rules of Civil Procedure.

Furthermore, although material factual disputes may be raised by affidavit, mere general and conclusory statements in an affidavit are insufficient to oppose a motion for summary judgment. According to the Utah Supreme Court, "[t]he allegations of a pleading or factual conclusions of an affidavit are insufficient to raise a genuine issue of fact." Reagon Outdoor Advertising, Inc., v. Lundgren, 692 P.2d 776, 779 (Utah 1984). See also, Treloggan v. Treloggan, 699 P.2d 747 (Utah 1985).[2] Thus, the burden to prove the

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[2] Federal courts interpreting Rule 56(c), Federal Rules of Civil Procedure, have also placed the burden of establishing a prima facie case for summary judgment on the movant. See e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Once the movant has satisfied its burden, the party opposing the motion must provide evidence of a material factual dispute. Failure to do so may result in the Court's concluding that there are no factual disputes.

Furthermore, mere allegations in a pleading or factual conclusions in an affidavit are insufficient to raise a genuine issue of fact. In Brown v. Parker-Hannifin Corp., 746 F.2d 1407 (10th Cir. 1984), the court stated:

existence of a material factual dispute shifts to the party opposing the motion for summary judgment after the moving party has established its prima facie case.

On the instant facts, Capital City established a properly supported prima facie case for summary judgment, thus satisfying its burden. Appellants, however, failed to introduce any evidence that would raise a genuine issue of material fact. The facts as established by Capital City, therefore, must be accepted as true. Applying the law to the undisputed facts, the district court correctly concluded that Capital City was entitled to summary judgment.

B. The District Court Correctly Found That There Were No Disputed Issues of Material Fact

In their complaint against Capital City, the Plaintiffs (Appellants herein), asked the district court to find that Appellants were discharged from any and all liability as guarantors of the December 24, 1979 note that was executed by Bagel Nosh in favor of Capital City. R. 10, ¶ 1. Capital City, in its answer and counterclaim, asked the court to declare

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> It is true that once a properly supported motion for summary judgment is made, the opposing party may not merely rest on the allegations in the complaint and must respond with some factual showing of the existence of a genuine issue of material fact.

Id. at 1412.

the validity of the guaranties and to order foreclosure of Capital City's interest under the guaranties. R. 32, ¶ 2.

Appellants asserted several bases in support of their contention that they were discharged from liability under the guaranties. Three of those bases are at issue in this appeal. One basis for the Appellants' action was that Capital City had allegedly breached the guarantee agreement. In particular, Appellants contended, inter alia, that Capital City's acts constituted an impairment of collateral, which discharged Appellants from their obligation under the guarantee agreements. R. 7-8. Appellants also argued that they should be discharged from liability as guarantors because of Capital City's alleged reckless loss of a security interest. R. 8-9. Finally, Appellants argued that they should be discharged from liability under the guaranties since the obligation underlying the guaranties was "substantially modified" by the Loan Reconstruction Agreement. R. 9. Appellant's did not submit any evidence to support such bare allegations in the pleadings. As discussed more fully below, however, Capital City submitted evidence showing that the allegations in Appellants' complaint were erroneous. In the face of such evidence, Appellants' bare assertions do not raise disputed factual issues.

On appeal, Appellants contend that, despite Capital City's uncontroverted evidence, four factual disputes remain. First, Appellants contend that Capital City has received ninety (90%) of the loan amount, plus interest from the SBA. Appellants'

Brief, p. 21. Appellants have provided no evidence to support that contention. Respondents have unequivocally established that the SBA has not paid any money to Capital City in connection with the note nor has the SBA received a transfer of the note. R. 251-252. Appellants, therefore, cannot rest on their bare allegations that the SBA paid 90% of the loan amount to Capital City in the face of specific evidence to the contrary. See, Reagon, supra.

Appellants' second contention is that a material factual dispute exists concerning whether the guaranties were issued to Capital City alone or to Capital City and the SBA as joint payees. Appellants' Brief, pp. 25-26. The guaranties are part of the record and speak for themselves. R. 36 and 40, 129 and 133. No factual dispute therefore exists.

Even if such facts were in dispute, however, they are not material to the issues before the Court. The guaranties relate to the obligations of Bagel Nosh under the note, which obligations are due and owing to Capital City. R. 186-188. Furthermore, the SBA has authorized Capital City to sue on the note. R. 251-252. Thus, as established on the record, the SBA has no cause of action against the Appellants. In light of the undisputed facts, whether the guaranties named the SBA becomes irrelevant. The issues set forth above are neither disputed nor material and cannot form the basis for a reversal of the district court's summary judgment in favor of Capital City.

Third, Appellants contend that a factual dispute exists concerning whether the guarantors made payments to Capital City under the guaranties. According to Appellants:

> The district court went on to state that the modifications to the underlying indebtedness cannot be complained of at this point by the guarantors where they have paid under the guaranty since the default of the principal debtor Bagel Nosh, and if not estopped at this point, have simply given their consent to modification. R. 311. There was no factual basis for this conclusion in the record before the trial court. While counsel for Capital City had represented to the court that payments had been made by the plaintiffs on the obligation following the default and bankruptcy proceeding of Bagel Nosh, those were merely representations of counsel unsupported by substantive, admissible evidence. The court nor the moving party on a motion for summary judgment can rely on inadmissible evidence or the assertions of counsel in granting a motion for summary judgment.

Appellants' Brief, p. 28, fn. 14 (citations omitted). That argument, however, misrepresents the record on appeal to this Court. Appellants thus either intentionally seek to misrepresent the facts or have failed to read their own complaint.

On p. 4, ¶ 14, of their complaint (R. 5), Appellants state as follows:

> 14. During the pendancy of Intermountain's bankruptcy proceedings, the Plaintiffs, as guarantors, have been making payments on the Capital City loan.

Appellants thus admit in their own pleadings that they made payments under the guaranties to Capital City. Capital City also has admitted that fact. R. 25, ¶ 14; R. 187, ¶ 15. The undisputed facts in the record, therefore, reveal no factual

dispute concerning Appellants' payments to Capital City under the guaranties.

Fourth, Appellants contend that the parties' intent to revoke the guaranties is a disputed factual issue. Appellants' Brief, p. 29. That issue, however, is not material on the instant facts. The intent of parties to a contract becomes relevant only if the language of the contract is "ambiguous and uncertain and susceptible of more than one construction." 17 Am. Jur. 2d, Contracts, §241, p. 626. See also, Utah Valley Bank v. Tanner, 636 P.2d 1060 (Utah 1981); Land v. Land, 605 P.2d 1248 (Utah 1980). Furthermore, such ambiguities must be "patent." See, Greer v. Stanolind Oil & Gas Co., 200 F.2d 920 (10th Cir. 1952). Courts generally agree that:

> It is fundamental that the principles of construction cannot be applied to vary the meaning of that which is otherwise clear and unambiguous, and, in this respect, it is to be noted that if the language of the contract is plain and unambiguous, the intention expressed and indicated thereby controls, rather than whatever may be claimed to have been the actual intention of the parties.

17 Am. Jur. 2d, supra.

In the instant case, the express language of the relevant documents reveals no dispute as to whether the parties intended the guaranties to be revoked. The Loan Restructure Agreement expressly states that "any item in the Loan Agreement dated December 24, 1979, that is not specifically modified by this Loan Restructure Agreement remains in full force." R. 44, ¶ 6. Nothing in the Loan Restructure Agreement expressly

modifies the guaranties. In fact, the Loan Restructure Agreement specifically refers to the personal guaranties that were executed in connection with the original note. R. 44, ¶ 15. The personal guaranties thus remain in full force. In the face of the express language of the Loan Restructure Agreement, the parties' intent is not a relevant issue.

Furthermore, even if Appellants' third and fourth contentions of factual disputes were correct, those facts are relevant only to establishing that the guaranties are not enforceable. Appellants, however, have admitted, in pleadings filed in connection with the Bagel Nosh bankruptcy proceeding, their continuing personal liability under the guaranties. R. 283. Such admissions thus belie the existence of a material factual dispute on that issue that could preclude summary judgment.

Appellants submitted no evidence in response to Capital City's properly supported factual assertions nor did they object to any evidence submitted by Capital City in support of its motion for summary judgment. Rather, the Appellants rested on the bare allegations of their pleadings. Appellants thus failed to show the existence of any genuine issues of material fact. The district court was, therefore, correct in concluding that "the allegations of 'material issues of fact remaining' by the Plaintiffs are without merit." R. 311.

POINT II

THE DISTRICT COURT CORRECTLY APPLIED THE LAW TO THE UNDISPUTED FACTS

The properly supported and uncontroverted facts establish that Capital City is entitled to summary judgment as a matter of law. As the district court found, and as the note provides, the substantive law to be applied is federal law. R. 105-106; R. 310. Under federal law, all substantive issues before this Court were appropriately resolved by the district court in favor of Capital City. Furthermore, according to the district court, even if Utah law were applied, Capital City would prevail as a matter of law. R. 308-313.

A. Appellants' Contentions that the District Court Erred As a Matter of Law are Meritless

Appellants argue that the district court's decision should be overturned on the basis of three erroneous legal conclusions. First, Appellants assert that the trial court erred in holding that Capital City, as holder of the note and guaranties, could enforce the obligations thereunder. Appellants' Brief, p. 25.

That argument implies that the district court relied on Capital City's status as the holder of the note and guaranties as the sole basis for holding that Capital City could enforce those documents. Appellants' argument thus seriously misconstrues the district court's memorandum decision. According to the Court:

> For the purposes of Rule 52(a) of the Utah Rules of Civil Procedure, the Court has granted Capital's

> motion on all the bases alleged by Capital in its moving papers and supporting documents, with the exception of the claims of laches, which the Court determines would require a further hearing, and are not ripe for summary judgment

R. 312 (emphasis added). Contrary to Appellants' argument, the district court thus rested its conclusions on all bases that were alleged by Capital City.

Capital City alleged two other bases for its contention that Capital City could enforce the note and guaranties in addition to its argument that it had such rights as the holder of those documents. Capital City argued that it could enforce the note and guaranties because Appellants had admitted their liability under the guaranties in the pleadings that were filed in the Bagel Nosh bankruptcy proceedings. Based on that admission, Capital City contended that Appellants were estopped from arguing that they were not liable on the guaranties. R. 243; R. 283. Capital City also argued that it could enforce the note and guaranties since Appellants had waived any defense that they were not liable by paying under the guaranties. R. 5; R. 93-94. Thus, the court's holding that Capital City could enforce the guaranties was based on Capital City's allegations of estoppel and waiver as well as Capital City's status as holder of the documents.

Appellants, however, do not assert that the court's reliance on estoppel and waiver were erroneous. They ask this court to overturn the district court's decision due to an alleged error on only one of three bases relied on by the district

court. Appellants assertion that the district court erred in concluding that Capital City could enforce the note and guaranties is, therefore, frivolous and without foundation.

Even if the district court had concluded that the SBA was not indispensable solely because Capital City was the holder of the negotiable instruments, that conclusion would not have been erroneous. As Appellants concede, the law is clear that the holder of negotiable instruments may sue to enforce such instruments. Appellants' Brief, p. 25. See also, Utah Code Ann. §§70A-3-301 and 70A-3-603 (1980).

Appellants' reliance on an exception in Arizona law to the general rule is misplaced under the facts of this case. Appellants rely on Vance v. Vance, 601 .2d 605 (Ariz. 1979) to support their contention that one of two joint payees on a negotiable instrument cannot enforce the instrument alone. In Vance, the joint payees were a husband and wife involved in a property dispute following a divorce. The wife sought to enforce a negotiable instrument payable to both her and her ex-husband without his consent. Since the ex-husband was subject to the court's jurisdiction, he was joined as a necessary party and the court did not dismiss the case. Id. at 607. Even in Vance the Arizona Supreme Court did not hold that the husband was an indispensable party without whom the case could not proceed.

The facts in Vance are inapposite to the instant facts. The Vance court addressed the enforceability of negotiable

instruments. Under applicable federal law, however, the form 148 guaranties executed by the Appellants are not instruments. In United States v. Meadors, 753 F.2d 590 (7th Cir. 1985), the Court stated that "a [SBA Form 148] guaranty is not a negotiable instrument if it contains a conditional promise to pay . . . ." Id. at 599. Appellants seek to distinguish Meadors on the basis that the present guaranties are unconditional. That distinction becomes meritless, however, upon an examination of the facts.

The SBA Form 148 guaranties signed by Appellants were unconditional and absolute once the obligation became due and was not paid by the Debtor. The Appellants had no obligation to Capital City, however, until Bagel Nosh defaulted on the underlying obligation. The guaranties specifically provide:

> In case the Debtor shall fail to pay all or any part of the liabilities when due, whether by acceleration or otherwise, according to the terms of said note, the undersigned, immediately upon the written demand of Lender, will pay to Lender the amount due and unpaid by the Debtor as aforesaid, in like manner as if such amount constituted the direct and primary obligation of the undersigned.

R. 36 and 40. As set forth in Meadors, such a "condition" thus precludes the guaranties from being classified as instruments.

The uncontroverted facts in the instant case further establish that, unlike the facts in Vance, the SBA is not a joint payee on the note. The SBA is merely a participant who has not purchased any of the loan from Capital City and who

has not received a transfer or assignment of the note. R. 251-252. The SBA thus has no cause of action against the Appellants. Furthermore, the SBA has expressly given Capital City written authorization to enforce the instruments. R. 251-252. The joint payee exception on negotiable instruments argued by Appellants does not apply to the instant facts, and Capital City, as holder of the note and guaranties, may enforce the obligations thereunder. Any alleged error of law on the grounds set forth by the Appellants is thus meritless and cannot form the basis for overturning summary judgment in favor of Capital City.

Second, Appellants argue that the trial court committed reversible errors of law in concluding that Appellants' claims of impairment of collateral, reckless loss of security interest, and modification were invalid, since it based that decision on the express waiver of rights in the guarantee agreement. Appellants' Brief, p. 28. Appellants' argument, however, misconstrues the district court's memorandum decision.

In its decision, the district court expressly found that, even disregarding the waiver in the guaranties, the uncontroverted facts could not form the basis for a cause of action against Capital City. Concerning the Appellants' claim of impairment of collateral, the court stated, "even if Utah law was applicable, no breach can be shown." R. 310. Therefore, the district court found that Plaintiffs had failed to state a cause of action irrespective of the waiver in the guaranties.

Concerning the Appellants' claim of reckless loss of a security interest, the undisputed evidence submitted by Capital City established the continuing validity of Capital City's security interest. According to the court, "As the record is clear that Capital has in fact protected its security interests, even if Utah law were applicable, Capital has complied." R. 311. Thus, although the district court found that the waivers in the guaranties were enforceable, the court also expressly held that there were no facts in the record to support Appellants' allegations of impairment of collateral or reckless loss of a security interest under either federal or Utah law.

The district court also found that the modifications in the Loan Restructure Agreement did not excuse the Appellants from liability under the guaranties. R. 311. Although the Appellants had expressly consented to modification of the note in the guaranties, Appellants' consent in the guaranties was not the only basis for the court's conclusion. The court stated:

> Certainly, the modifications which are in actuality more favorable to the Plaintiffs/guarantors cannot be complained of at this point by the guarantors where they have paid under the guarantee since the default of the principal debtor, Bagel Nosh, and if not estopped at this point, have impliedly given their consent to the modification. Accordingly, the Plaintiffs/guarantors have waived the defense regarding modification and if they have not so waived that defense through the guaranties, they are estopped and have otherwise consented to the modification.

R. 11. Thus, the express language of the Memorandum Decision evidences the Court's consideration of facts and applicable

law outside the waivers in the guaranties, making Appellants' contention meritless.

Furthermore, that factual argument is irrelevant. The record shows that the guarantors have admitted their continuing obligations under the guaranties in the legal pleadings filed by Appellants in connection with the Bagel Nosh bankruptcy proceedings. R. 283. The record also shows that Appellants have waived any defense of non-liability under the guaranties by making payments thereunder. R. 24, ¶ 14; R. 187, ¶ 15. Unsupported factual assertions that the guaranties are not enforceable due to modifications in the underlying agreement, therefore, carry no evidentiary value in the face of Appellants' admissions.

Even if the district court had relied on the guaranty agreements as the only bases for its decision, however, the decision would have been correct as a matter of law. As set forth above, the unconditional personal guaranties executed by each Appellant are valid and thus preclude the assertion of any of the defenses claimed by Appellants. The district court's decision is supported by the facts in the record and is a correct application of the law. As such, it may not be upset on appeal.

Third, Appellants argue that the district court erred in failing to consider whether the parties intended to revoke the guaranties when the Loan Restructure Agreement was executed. Appellants' Brief, pp. 32-33. As discussed in Point B above,

the parties' intent is irrelevant on the instant facts. The court's failure to consider an irrelevant argument cannot be an error of law. Furthermore, Appellants did not submit any evidence concerning intent to revoke the guaranties. Appellants merely rested on the bare allegations in their pleadings. Capital City, however, submitted evidence in opposition to Appellants' assertions. The facts as set forth by Capital City may, therefore, be considered undisputed. In light of the record, the district court did not err as a matter of law in failing to consider an issue that was not even raised as a factual dispute.

Each of the alleged errors of law asserted by Plaintiffs is based on a misrepresentation and misconstruction of the district court's memorandum decision. Furthermore, the applicable law does not support Appellants' arguments. Finally, such alleged errors of law are irrelevant to the issues before this Court. The frivolous and unfounded allegations should thus be disregarded and should not form the basis for overturning the trial court's decision.

POINT III

THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT THE SBA WAS NOT AN INDISPENSABLE PARTY

Appellants filed a complaint against Capital City asking the trial court to declare that "the Guaranty Agreements entered into by each of the individual Plaintiffs guarantying the obligations of Intermountain to the Defendant on or about

December 24, 1979, to be void and of no effect and discharging the Plaintiffs from any obligation thereunder." R. 10, ¶ 1. The SBA was not named as a party defendant in the action, despite Appellants' demand that Appellants be discharged from all obligations under the guaranties. R. 2-11.

Capital City counterclaimed, asking the court to hold that the guaranties are valid obligations of the Appellants. R. 32, ¶ 2. Both Appellants and Capital City thus asked the court to determine the validity of the guaranties and the Appellants' liability thereunder. Despite the complete identity of the issues involved in the complaint and counterclaim, Appellants did not seek to amend the complaint in order to add the SBA as a party to the action. Obviously, Appellants did not consider the SBA to be necessary or indispensable to a determination of liability under the guaranties. Appellants contended, however, in their memorandum opposing Capital City's motion for summary judgment, that the SBA is an indispensible party to Capital City's counterclaim and asked the court to dismiss the counterclaim if the SBA could not be joined. R. 218-221. Appellants contention that the SBA is indispensable to the counterclaim thus contradicts Appellants' own actions.

In ruling on whether the SBA was an indispensible party to the counterclaim, the trial court stated that "the defense is without merit." R. 312. The court also noted that "the SBA is not under the present interpretation of the Rules of Procedure an indispensable party to this action." R. 312.

The district court's decision that joinder of the SBA is not essential may not be disturbed on appeal unless the district court abused its discretion in reaching that decision. Bonnevillle Tower v. Thompson Michie Assoc., 728 P.2d 1017, 1020 (Utah 1986). See also, R.J. Enstrom Corp. v. Interceptor Corp., 555 F.2d 277 (10th Cir. 1977); Northrop Corp. v. McDonnel Douglas Corp., 705 F.2d 1030 (9th Cir. 1983).

Appellants have not demonstrated that the district court abused its discretion in concluding that the SBA was not an indispensable party to the case. In support of their appeal from the district court's ruling on that issue, Appellants argue that the trial court did not "comply with the procedural requirements of Rule 19 and applicable federal case law." Appellants' Brief, p. 12. That argument, however, ignores the policies underlying Rule 19. Furthermore, the federal case law cited by Appellants in support of their position is not applicable to this action in the Utah courts. Finally, even if federal law applied, it does not support Appellants' position.

As discussed in Point II above, the procedural aspects of this case are governed by Utah procedural rules. Rule 19, Utah Rules of Civil Procedure, provides that before dismissing a case for nonjoinder of a party, a court must determine if the party is "necessary," to the litigation for several reasons set forth in the rule. If a court finds that the party is "necessary" it may not dismiss the action unless the court

determines that it cannot shape relief or lessen the prejudice in some fashion to avoid the harm that could result from proceeding without the "necessary" party. Rule 19(b) thus requires courts to refrain from dismissing a case for nonjoinder of a party if any prejudice that could be caused as a result of the nonjoinder can be mitigated through less drastic action. See, Provident Trademens Bank and Trust Co., 390 U.S. 102, 19 L.Ed.2d 936, 88 S.Ct. 733 (1968) (cited approvingly by the Utah Supreme Court in State v. Toledo, 699 P.2d 711 (Utah 1985) and in Sanpete County, etc., v. Price River, etc., 652 P.2d 1302 (Utah 1982) for its interpretation of Rule 19, Federal Rules of Civil Procedure, which is "substantially identical" to Rule 19, Utah Rules of Civil Procedure. Utah Court Rules Ann. Rule 19, Compiler's notes (1987)).[3]

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[3] All of the federal cases cited by Appellants reflect the policy underlying Rule 19, Federal Rules of Civil Procedure, that a court must determine if it can fashion relief without dismissal if a necessary party cannot be joined. In each case, the trial court had dismissed the action upon a determination that a necessary party could not be joined. The appellate courts in each instance reversed and remanded the case for a determination of whether less drastic action would be appropriate. See, Provident Trademens Bank and Trust Co., 390 U.S. 102, 19 L.Ed.2d 936, 88 S.Ct. 733 (1968) (stating, "To say that a court 'must' dismiss in the absence of an indispensable party and that it 'cannot proceed' without him puts the matter in the wrong way around: a court does not know whether a particular person is 'indispensable' until it has examined the situtation to determine whether it can proceed without him." Id. at 19, L.Ed.2d 950) Manygoats v. Kleppe, 558 F.2d 556 (10th Cir. 1977) (remanding for a determination whether prejudice was actual and thus requiring dismissal); Wright v. First National Bank of Altus, Oklahoma, 483 F.2d 73 (10th Cir. 1973) (remanding to the trial court for reasons

In the instant case, however, the district court concluded that the SBA was not indispensable and did not dismiss the action. R. 312. Under Rule 19, the court need not engage in the same analysis that would be required if the court had dismissed the action for lack of an indispensable party. The court's failure to discuss the factors set forth in Rule 19(b) thus does not constitute an abuse of discretion.

Furthermore, Appellants' argument ignores the purpose of Rule 19. According, to the Utah Supreme Court:

> The purpose of Rule 19(a), Utah Rules of Civil Procedure, which requires the joinder of indispensable parties as a condition to suit, is to guard against the entry of judgments which might prejudice the rights of such parties in their absence.

Sanpete County, supra, at 1306. From the facts in the record, it is evident that no harm to either the present parties or the SBA could result from the trial court's ruling. Although Appellants assert that they have an "overpowering substantive interest . . . to not be subjected to additional, duplicative liability by the piecemeal adjudication of the specific guaranty agreements," Appellants' Brief, p. 13, Appellants do not demonstrate how a failure to join the SBA could impair that interest.

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why the trial court cannot proceed in the absence of a necessary party). Thus, even under Rule 19, Federal Rules of Civil Procedure, which Appellants seek to have this Court apply, a court must justify its decision to dismiss a case for nonjoinder of a necessary party under the analysis set forth in subsection (b) of the rule.

Conversely, the uncontroverted facts in the record establish that no interest of the Appellants could be compromised by a failure to join the SBA as a party to this action. Bagel Nosh executed a note in favor of Capital City in the principal sum of $300,000.00 on or about December 24, 1979, R. 3, ¶ 5; R. 28, ¶2, and the Appellants executed absolute, unconditional guaranties of that note in favor of Capital City Bank on the same date. R. 4, ¶ 7; R. 28, ¶ 4. The loan to Bagel Nosh was fully funded by Capital City, R. 187; R. 251-252, and the SBA has not purchased any portion of the debt nor have the Note or guaranties been transferred to the SBA. R. 251-252. Therefore, since the SBA has not purchased any of the loan or received an assignment or transfer of the note, the SBA has no present right to proceed against Appellants.[4]

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[4] Appellants argue that Rule 19 should be applied to avoid possible harm, not only certain harm. As set forth above, the SBA has no possible cause of action against Appellants. That argument is thus inapplicable on the instant facts. However, even if the SBA possibly could bring an action against Appellants, Rule 19 does not require joinder of the SBA. In Coastal Modular Corp. v. Laminators, Inc., 635 F.2d 1102 (4th Cir. 1980), a contractor sued a supplier of air traffic control towers for defective units that were supplied to the contractor and thereafter put into a Navy installation. Although the Navy insisted that it looked to the contractor for correction of the problem, the supplier contended that the Navy was an indispensible party and must be joined in order to avoid the potential of multiple liability. Upholding the trial court, the Fourth Circuit stated:

> [The supplier] contends that it may be subject to a substantial risk of incurring multiple obligations because the Navy is not a party to the action. The trial court justifiably found, however, that [the supplier] could only theorize the possibility that

Furthermore, the SBA has authorized Capital City in writing to sue on the note and guaranties. R. 251-252. Thus, even if the SBA were to purchase part of the note under the participation agreement with Capital City, they would only have a cause of action against Capital City. The uncontroverted facts in the record establish that Appellants are not and cannot be harmed by a failure to join the SBA. Any duplicative liability of Appellants is thus precluded. The district court thus did not err in concluding that the SBA was not an indispensable party.

CONCLUSION

The district court did not err in granting summary judgment in favor of Capital City. Capital City, on the undisputed facts before the court, satisfied its burden of establishing that Capital City is entitled to summary judgment in its favor as a matter of law. Although Appellants assert that genuine issues of material fact should have precluded summary judgment, Appellants failed to introduce any evidence whatsoever to raise

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> the Navy would institute suit against it. Nothing before the court suggested a substantial likelihood of such a suit . . . we find no abuse of discretion under the circumstances.

Id. at 1108. Similarly, in the instant case there is nothing to suggest that the SBA would institute suit against the Appellants. In fact, the uncontroverted facts in evidence establish that the SBA has given Capital City authorization to sue on the note and guaranties. Thus, as in Coastal, the district court did not abuse its discretion in concluding that the SBA is not an indispensable party.

any disputed issues.

The district court did not err in concluding that the undisputed facts entitled Capital City to summary judgment as a matter of law. The undisputed facts in the record show that Appellants admitted their liability under the guaranties in pleadings filed by Appellants in the Bagel Nosh bankruptcy proceedings. Appellants also waived any claims that their personal guaranties had been revoked or were otherwise unenforceable by their payments to Capital City under the guaranties. Furthermore, Appellants failed to establish that intent to modify the guaranties is even relevant, since the loan restructure agreement is clear on its face as to the continuing validity of the guaranties.

Even if the guaranties were not enforceable, however, Appellants would not be able to recover. Appellants did not produce any evidence showing how Capital City allegedly impaired collateral or recklessly lost its security interest in the collateral or that Capital City had a legal duty to refrain from doing so.

Finally, Appellants failed to produce any evidence that the SBA is an indispensable party. The undisputed facts show that the SBA did not purchase any of the loan to Appellants or receive a transfer or assignment of the note that was executed in favor of Capital City. Thus, the SBA does not have a cause of action against Appellants. Even if the SBA did have any right to proceed against Appellants, however, the SBA authorized

Capital City in writing to enforce any obligations due from Appellants. The SBA is not, therefore, necessary or indispensable to this case.

The record before this Court evidences no genuine issue of material fact that would preclude summary judgment in favor of Capital City as a matter of law. Based on an examination of the record and an analysis of the applicable law, each and every claim by Appellants is meritless. Furthermore, the district court was correct in ruling in favor of Capital City on its counterclaim. From the facts in the record and as a matter of law, the district court correctly granted Capital City's motion for summary judgment.

Wherefore, Respondent respectfully requests this Court to affirm the district court's decision and the partial final judgment in their entirety and award to Capital City costs and attorneys' fees incurred in defending this appeal.

RESPECTFULLY SUBMITTED this 8th day of December, 1987.

WATKISS & CAMPBELL

Marco B. Kunz

Marco B. Kunz
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Marco B. Kunz, attorney for Respondent in the above-entitled action, hereby certify that on the 8th day of December, 1987, I served the foregoing Brief of the Respondent

A D D E N D U M

DANIEL W. JACKSON (1633)
JEFFREY W. WILKINSON (3754)
JACKSON & WILKINSON
Arrow Press Square, Suite 200
165 South West Temple
Salt Lake City, UT 84101
Telephone (801) 328-1800

IN THE THIRD JUDICIAL DISTRICT COURT

OF SALT LAKE COUNTY, STATE OF UTAH

SIDNEY SEFTEL, THERESA SEFTEL, and MICHAEL LANDES Plaintiffs, vs. CAPITAL CITY BANK, a Utah Corporation Defendant.	COMPLAINT Civil No. _____

COMPLAINT

Plaintiffs Sidney Seftel, Theresa Seftel and Michael Landes, by and through their attorneys Daniel W. Jackson and Jeffrey W. Wilkinson, complain and allege against the Defendant as follows:

JURISDICTION

1. Plaintiffs Sidney Seftel and Theresa Seftel are residents of the State of Utah, residing at 8501 Kings Hill Drive, Salt Lake City, UT 84121.

2. Plaintiff Michael Landes is a resident of the State of New York with offices located at the Almi Building, 1585 Broadway, New York, NY 10036.

3. Defendant Capital City Bank is a Utah corporation with principal offices located at 2200 South State Street, Salt Lake City, UT 84115

4. The Plaintiffs' claim against the Defendant arises from a business transaction between the Plaintiffs and the Defendant within the State of Utah. Therefore, jurisdiction and venue are proper in this court.

GENERAL ALLEGATIONS

5. On or about December 24, 1979, Defendant Capital City Bank loaned $300,000.00 to Bagel Nosh Intermountain Ltd., a New York corporation ("Intermountain"). The interest on the loan was at a variable rate. (Copies of the Note and the Authorization and Loan Agreement are attached as Exhibit "A".)

6. The purpose of the loan was to finance the construction and operation of a Bagel Nosh restaurant in Park City, Utah. All of Intermountain's property at this location was pledged as security for the loan. Defendant filed a financing statement covering all equipment, smallwares and

fixtures located at the Park City restaurant, pursuant to the loan documents.

7. On or about December 24, 1979, the Plaintiffs executed Guaranty Agreements in connection with this loan. (Copies of those agreements are attached as Exhibit B.)

8. On or about October 31, 1980, Intermountain's Park City restaurant was closed. The Park City equipment, machinery, furniture and supplies were moved to Intermountain's restaurant located at Crossroads Mall in Salt Lake City, Utah. Intermountain subleased the restaurant space at Crossroads from Powder Hound Holding Corporation, a Utah corporation.

9. The Plaintiffs are informed and believe and on the basis of that information and belief allege that the Defendant had actual, constructive and inquiry notice of the close of the Park City location and of the transfer of the secured property to the Crossroads location.

10. Despite such notice, the Defendant failed to amend its financing statement to reflect that it had any claim to the property located at the Crossroads Mall restaurant.

11. On November 29, 1984, Intermountain filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Utah.

12. Defendant has had actual, constructive and inquiry notice pertaining to all matters relating to Intermountain's bankruptcy.

13. Despite such notice, the Defendant failed to take any steps in Bankruptcy Court to secure its right in the secured property above that of other creditors in Intermountain's bankruptcy proceedings.

14. During the pendancy of Intermountain's bankruptcy proceedings, the Plaintiffs, as guarantors, have been making payments on the Capital City loan.

15. On or about February 5, 1986, a default judgment was entered against Power Hound Holding Corporation, dba Bagel Nosh in favor of Crossroads Plaza Associates for past due rent.

16. On said date, a Writ of Execution and Restitution was issued against all of the property located at the Crossroads Mall restaurant.

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17. On or about February 7, 1984, the Sheriff of Salt Lake County took possession of said property.

18. The Plaintiffs are informed and believe and on the basis of said information and belief allege that a loan officer at Capital City, on or about February 14, 1985, unequivocally represented to an agent of Crossroads Plaza Associates that the Defendant did not have any interest in Intermountain's property at the Crossroads Mall restaurant.

19. The loan officer's denial of any security interest in the Intermountain property located at the Crossroads Mall restaurant constitutes a waiver of the Defendant's security interest in the collateral.

20. Subsequent to said representation by the Defendant's agent, the Intermountain property was sold at a sheriff's sale on or about February 21, 1986, in execution of a landlords' lien alleged to be held by Crossroads Plaza Associates.

21. All proceeds from the sale went to Crossroads Plaza Associates in payment of past due rent.

22. Pursuant to Section 70A-1-203 of the Utah Uniform Commercial Code, Capital City Bank, as creditor, has a duty to act in good faith in connection with the performance and enforcement of the loan contract.

23. Therefore, Defendant had a duty to protect its security interest in the Intermountain property located at the Crossroads Mall restaurant.

24. The Defendant breached this duty by the following acts and omissions:

a. The Defendant failed to properly perfect and maintain a perfected interest in the collateral pledged by Intermountain.

b. The Defendant failed to properly amend its financing statement to give proper notice to subsequent purchasers of its security interest in Intermountain's property located at the Crossroads Mall restaurant.

c. The Defendant failed to take any actions in the Bankruptcy Court to secure its rights to the collateral above other creditors in Intermountain's bankruptcy proceedings.

d. The Defendant abandoned and waived its interest in the collateral by its representations to the agent for Crossroads Plaza Associates that it had no interest in the Crossroads property.

25. But for the Defendant's willful and reckless acts and willful and reckless failure to act, the collateral would not have been lost.

26. Said collateral was sufficient to pay the amount outstanding on the loan.

27. The Defendant's loss of its right to recover against the collateral has damaged the Plaintiffs by impairing their right to subsequently recover their losses from the collateral.

FIRST CAUSE OF ACTION

BREACH OF CONTRACT

28. Plaintiffs hereby reallege the allegations contained in paragraphs 1 through 27 as if fully set forth herein.

29. Said acts and omissions of the Defendant constitute a breach of the Guaranty Agreements and by their terms discharge the Plaintiffs' obligations as guarantors.

30. The transaction between Intermountain, Plaintiffs and the Defendant is governed by Utah Uniform Commercial Code Sections 70-3-101 et. seq.

31. The Defendant's acts constitute an unjustifiable impairment of the collateral which discharges the Plaintiffs' obligation pursuant to Section 70A-3-606(1)(b) of the Utah Uniform Commercial Code.

SECOND CAUSE OF ACTION

RECKLESS LOSS OF SECURITY INTEREST

32. Plaintiffs hereby reallege the allegations contained in paragraphs 1 through 31 as if fully set forth herein.

33. Defendant acted willfully or recklessly in its acts and omissions detailed above and breached its duty to the Plaintiffs an guarantors, to perfect and maintain its interest in the collateral.

34. The willful and reckless acts and omissions of the Defendant resulted in a total impairment of the collateral and precludes any recovery from the collateral by Plaintiffs pursuant to their rights of subrogation.

THIRD CAUSE OF ACTION

CHANGE OF PRINCIPAL OBLIGATION

35. The Plaintiffs reallege the allegations contained in paragraphs 1 through 34 as if fully set forth herein.

36. The Plaintiffs are informed and believe and on the basis of said information and belief allege that on March 30, 1983, the Defendant and Intermountain entered into a Loan Restructure Agreement which substantially modified the December 24, 1979 loan agreement.

37. Because said agreement substantially modified the original loan agreement for which the Plaintiffs were guarantors and the Plaintiffs did not assent to the modifications, their obligations as guarantors are discharged.

WHEREFORE, The Plaintiffs pray for the following relief pursuant to the allegations contained in the First, Second and

Third Causes of Action, and demand judgment against the Defendant as follows:

1. For an order of the court declaring the Guaranty Agreements entered into by each of the individual Plaintiffs guaranteeing the obligations of Intermountain to the Defendant on or about December 24, 1979, to be void and of no effect and discharging the Plaintiffs from any obligation thereunder;

2. For the costs incurred in bringing this action, including a reasonable attorney's fee; and

3. For such other and further relief as the court deems appropriate.

Dated this 11th day of March, 1986.

JACKSON & WILKINSON

By _____
DANIEL W. JACKSON
JEFFREY W. WILKINSON

Plaintiffs' addresses:

Sidney & Theresa Seftel
8501 Kings Hill Drive
Salt Lake City, UT 84121

Michael Landes
Almi Building
1585 Broadway
New York, NY 10036

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Herschel J. Saperstein (2861)
Karen C. Jensen (1680)
Steven T. Waterman (4164)
WATKISS & CAMPBELL
310 South Main, Suite 1200
Salt Lake City, Utah 84101
Telephone: (801) 363-3300

Attorneys for Defendant/Counterclaimant, Capital City Bank

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

SIDNEY SEFTEL, THERESA SEFTEL, and MICHAEL LANDES, Plaintiffs, vs. CAPITAL CITY BANK, a Utah corporation, Defendant.	Civil No. C86-1810 (Judge Hanson)
CAPITAL CITY BANK, a Utah corporation, Counterclaimant, vs. SIDNEY SEFTEL, THERESA SEFTEL, MICHAEL LANDES, UTAH STATE TAX COMMISSION, CROSSROADS PLAZA ASSOCIATES, a Utah joint venture and general partnership, YOUNG ELECTRIC SIGN COMPANY, a Utah corporation, and OLYMPUS HILLS SHOPPING CENTER, LTD., a Utah limited partnership, Counterclaim Defendants.	**CAPITAL CITY BANK'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

WATKISS & CAMPBELL
ATTORNEYS AT LAW
TWELFTH FLOOR, 310 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101-2171

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Capital City Bank (hereinafter "Capital City") by and through its counsel, Watkiss & Campbell, files this memorandum of points and authorities in support of its Motion for Summary Judgment in accordance with Rule 2, Supplementary Rules of Practice - Third Judicial District, and this Court's Ex Parte Order granting leave to file a Memorandum of Points and Authorities in excess of five (5) pages in length. Plaintiffs, Sidney Seftel, Theresa Seftel (hereinafter "Seftel"), and Michael Landes (hereinafter "Landes"), may be referred to herein collectively as "Guarantors."

STATEMENT OF MATERIAL FACTS

1. On or about December 24, 1979, Bagel Nosh Intermountain, Ltd., a New York corporation (hereinafter "Bagel Nosh"), executed a Note (hereinafter "Note") in favor of Capital City in the principal sum of $300,000.00, which note was executed by Sidney Seftel as Vice-President of Bagel Nosh, a copy of which is attached hereto as Exhibit 1 and incorporated herein by this reference. [Plaintiffs' Complaint ¶ 5, admitted by Capital City; Capital City's Counterclaim ¶ 2, admitted by Plaintiffs]

2. As explicitly stated, the Note was executed by Bagel Nosh to secure a loan in which the Small Business Administration (hereinafter "SBA"), an agency of the United States, is participating. [See Note (last paragraph), Exhibit 1]

3. The Note provides that federal law governs its enforcement. [See Note (last paragraph) Exhibit 1; See also 13 C.F.R. §101.1(d)]

4. Seftel and Landes, Plaintiffs, are the officers and directors of Bagel Nosh, according to the certified statement of the State of Utah - Department of Business Regulation which includes documents signed by Landes and Sidney Seftel as officers of Bagel Nosh, a copy of which is attached hereto as Exhibit 2 and incorporated herein by this reference.

ATTORNEYS AT LAW
TWELFTH FLOOR, 310 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101-2171

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5. Sidney Seftel and Landes resigned as officers and directors of Bagel Nosh although each owns fifty percent (50%) of the stock of Bagel Nosh according to the sworn statement of the authorized officer of Bagel Nosh filed in the Bagel Nosh bankruptcy proceeding, a certified copy of which is attached hereto as Exhibit 3 and incorporated herein by this reference.

6. On even date with the Note, Seftel executed an absolute, unconditional, personal guaranty (SBA Form 148) (hereinafter "Seftel Guaranty") of the Note in favor of Capital City, a copy of which is attached hereto as Exhibit 4 and incorporated herein by this reference. [Plaintiffs' Complaint ¶ 7, admitted by Capital City; Capital City Counterclaim ¶ 4, admitted by Seftel].

7. Of even date with the Seftel Guaranty, Seftel executed a Trust Deed (hereinafter "Seftel Trust Deed") in favor of Capital City as collateral security for the Seftel Guaranty, a copy of which is attached hereto as Exhibit 5 and incorporated herein by this reference. [Capital City's Answer and Counterclaim ¶ 5, admitted by Seftel]

8. On even date with the Note, Landes executed an absolute, unconditional, personal guaranty (SBA Form 148) (hereinafter "Landes Guaranty") of the Note in favor of Capital City, a copy of which is attached hereto as Exhibit 6 and incorporated herein by this reference. [Plaintiffs' Complaint ¶ 7, admitted by Capital City; Capital City's Answer and Counterclaim ¶ 7, admitted by Landes]

9. On even date with the Landes Guaranty, Landes executed a Trust Deed (hereinafter "Landes Trust Deed") in favor of Capital City as collateral security for the Landes Guaranty, a copy of which is attached hereto as Exhibit 7 and incorporated herein by this reference. [Capital City's Answer and Counterclaim ¶ 8, admitted by Landes]

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TWELFTH FLOOR, 310 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101-2171

10. The Seftel Guaranty and Landes Guaranty, previously incorporated as Exhibits 4 and 6, (which are identical SBA Form 148 absolute, unconditional, personal guaranties) explicitly state:

> [T]o Lender . . . the due and punctual payment when due, whether by acceleration or otherwise . . . of the principal of and interest on and all sums payable . . . with respect to the note of the Debtor . . ..
>
> * * * * *
>
> [G]rants to Lender full power, in its uncontrolled discretion and without notice . . . to deal in any manner with the liabilities and the collateral, including . . . [power]:
>
> (a) To modify or otherwise change any terms of all or any part of the liabilities or the rate of interest thereon . . . to grant any extension or renewal thereof . . . and to effect any release, compromise, or settlement with respect thereto:
>
> * * * * *
>
> (d) To consent to the substitution, exchange, or release of all or any part of the collateral . . ..
>
> * * * * *
>
> The obligations of the [Plaintiffs] hereunder shall not be released, discharged, or in any way affected, nor shall the [Plaintiffs] have any rights or recourse against Lender, by reason of any action Lender may take or omit to take under the foregoing powers. (emphasis added).

11. On or about March 30, 1983, Bagel Nosh, Capital City, and the SBA entered into a Loan Restructure Agreement modifying the terms of the Note, a copy of which is attached hereto as Exhibit 8 and incorporated herein by this reference. [Plaintiffs' Complaint ¶ 36, admitted in part by Capital City]

12. The Loan Restructure Agreement was signed by Sidney Seftel and provided for: (a) curing the existing default in payments on the Note; (b) payment of a minimal amount on the principal indebtedness; (c) Bagel Nosh to submit monthly financial statements; (d) personal financial statements of Sidney Seftel and Landes to be submitted; (e) a reduction in monthly payments from $5,557.50 per month to

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ATTORNEYS AT LAW
TWELFTH FLOOR, 310 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101-2171

$4,000.00 per month; and (f) a reduction in the interest rate charged by one-half of one percent.

13. Bagel Nosh filed a voluntary petition under Chapter 11 of the Bankruptcy Code on November 29, 1984. [Plaintiffs' Complaint ¶ 11, admitted by Capital City]

14. As alleged by Plaintiffs, during the pendency of the Bagel Nosh bankruptcy proceeding, Plaintiffs, as Guarantors, have been making monthly payments in the reduced amount on the Note in favor of Capital City in accordance with the provisions of the Loan Restructure Agreement. [Plaintiffs' Complaint ¶ 14, admitted by Capital City]

15. Seftel and Landes, Plaintiffs, are also the officers and directors of Powder Hound Holding Corporation, a Utah corporation ("Powder Hound"), according to the certified copies of the Articles of Incorporation and annual reports filed with the State of Utah - Department of Business Regulations which include the signature of Theresa Seftel, copies of which are attached hereto and incorporated herein by this reference.

16. A judgment by default for failure to answer the complaint was entered against Powder Hound and in favor of Crossroads Plaza Associates on February 5, 1985, in Case No. C85-256 of the Third Judicial District Court of Salt Lake County and recorded in Docket 195 at page 2223, a certified copy of which is attached hereto as Exhibit 10 and incorporated herein by this reference.

17. Seftel and Landes are co-defendants with Powder Hound in the action referenced in paragraph 16 above and filed answers of their own in that proceeding but not on behalf of Powder Hound as evidenced by the certified copies of those documents attached hereto as Exhibit 11 and incorporated herein by this reference.

18. The allegations of the Plaintiffs in paragraphs 15, 16, and 17 of their complaint, including the execution sale resulting in the alleged loss of equipment

WATKISS & CAMPBELL
ATTORNEYS AT LAW
TWELFTH FLOOR, 310 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101-2171

which secures Capital City, arise from the action described in paragraphs 16 and 17 above.

19. At all times relevant to this action, Capital City has maintained and still maintains a perfected security interest, pursuant to Article 9 of the Utah Uniform Commercial Code - Secured Transactions, in all equipment, machinery, and other personal property of Bagel Nosh according to the certified copy of the records and search of the State of Utah - Division of Uniform Commercial Code, a copy of which is attached hereto as Exhibit 12 and incorporated herein by this reference.

20. No authorized officer of Capital City or any person charged with the responsibility for administering the Bagel Nosh loan has at any time represented to any person that Capital City did not have or does not have an interest in the equipment of Bagel Nosh. [Affidavit of M.A. Allem attached hereto as Exhibit 13 and incorporated herein by this reference]

21. The Note, Seftel Guaranty, Seftel Trust Deed, Landes Guaranty, Landes Trust Deed, and Loan Restructure Agreement are all in default due to inter alia, the failure of Bagel Nosh, Seftel, or Landes to make payments to Capital City when due. [Affidavit of M.A. Allem (Exhibit 13)]

22. The interests of the Utah State Tax Commission, if any, in the property of Seftel and Landes described in the Seftel Trust Deed and the Landes Trust Deed are by virtue of a warrant for delinquent tax dated January 19, 1984, a certified copy of which is attached hereto as Exhibit 14 and incorporated herein by this reference, which warrant was entered February 3, 1984, in the Clerk's Office of Salt Lake County, Utah, in Docket 185 at page 826 more than four years after recordation of both the Seftel Trust Deed and the Landes Trust Deed, inferior to the interests of Capital City.

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23. The interests of Crossroads Plaza Associates, if any, in the property of Seftel and Landes described in the Seftel Trust Deed and the Landes Trust Deed were alleged by Capital City based upon foreclosure reports (received from a title company) referencing a judgment entered February 5, 1985, in Case No. C85-256 of the Third Judicial District Court of Salt Lake County and recorded in Docket 195 at page 2223, but said judgment was only entered against Powder Hound, although both Seftel and Landes are co-defendants in that proceeding as previously discussed in paragraph 16 above, which judgment is nevertheless inferior to the interests of Capital City.

24. The interests of Young Electric Sign Company, if any, in the property of Seftel and Landes described in the Seftel Trust Deed and the Landes Trust Deed were alleged by Capital City based upon foreclosure reports (received from a title company) referencing a judgment entered February 20, 1985, a certified copy of which is attached hereto as Exhibit 15 and incorporated herein by this reference, in Case No. C85-0611 of the Third Judicial District Court of Salt Lake County and recorded in Docket 196 at page 350, but said judgment is only entered against Sidney Seftel and which judgment was recorded more than four years after recordation of both the Seftel Trust Deed and the Landes Trust Deed inferior to the interests of Capital City.

25. The interests of Olympus Hills Shopping Center, if any, in the property of Seftel and Landes described in the Seftel Trust Deed and the Landes Trust Deed were alleged by Capital City based upon foreclosure reports, but Olympus has no outstanding unpaid judgment against Seftel or Landes, currently outstanding according to the affidavit of Richard L. Skankey, its authorized partner, which affidavit is attached hereto as Exhibit 16 and incorporated herein by this reference.

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ARGUMENT

Based upon the material facts set forth herein, to which there is no genuine dispute, Capital City maintains that this entire proceeding, including both the Plaintiffs' causes and the counterclaims of Capital City, is ripe for complete disposition on summary judgment as a matter of law. Each of the Plaintiffs' causes of action as well as the counterclaim of Capital City are addressed in the following points.

Point I

CAPITAL CITY HAS NOT BREACHED ANY CONTRACT WITH PLAINTIFFS AS ALLEGED

Plaintiffs' first cause of action in their complaint asserts that Capital City has breached the Guaranty Agreements between Capital City and the Plaintiffs due to the alleged acts and omissions of Capital City. Plaintiffs further assert that the alleged acts of Capital City are governed by the Utah Uniform Commercial Code and constitute "an unjustifiable impairment of collateral" discharging Plaintiffs pursuant to Utah Code Ann. §70A-3-606(1)(b)(1980).

No provision of the guaranty agreements is cited to this Court by Plaintiffs. Indeed, none can be cited by Plaintiffs. To the contrary, the guaranties specifically provide that each Plaintiff unconditionally guarantees:

> [T]o Lender . . . the due and punctual payment when due, whether by acceleration or otherwise . . . of the principal of and interest on and all sums payable . . . with respect to the note of the Debtor . . ..

Each Plaintiff as guarantor in the guaranty further:

> [G]rants to Lender full power, in its uncontrolled discretion and without notice . . . to deal in any manner with the liabilities and the collateral, including . . . [power]:
>
> (a) To modify or otherwise change any terms of all or any part of the liabilities or the rate of interest thereon . . . to grant any extension or renewal thereof . . . and to effect any release, compromise, or settlement with respect thereto:

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SALT LAKE CITY, UTAH 84101-2171

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TWELFTH FLOOR, 310 SOUTH MAIN STREET
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* * * * *

(d) To consent to the substitution, exchange, or release of all or any part of the collateral . . ..

* * * * *

The obligations of the [Plaintiffs] hereunder shall not be released, discharged, or in any way affected, nor shall the [Plaintiffs] have any rights or recourse against Lender, by reason of any action Lender may take or omit to take under the foregoing powers. (emphasis added).

Consequently, even if Plaintiffs could establish the allegations of their complaint, Plaintiffs have failed to establish any breach of the express contractual terms of their guaranties. Plaintiffs have expressly waived their rights by the terms and provisions of the guaranties if any existed.

Plaintiffs' cause predicated upon the Utah Uniform Commercial Code is inapt. The Note explicitly provides, in the final paragraph thereof, that it is to be construed and enforced in accordance with applicable federal law pursuant to 13 C.F.R. §101.1(d). E.g., Ricks v. United States, 434 F.Supp. 1262, 1267 (S.D.Ga. 1976). The identical SBA Form 148 Guaranty has been interpreted by the Tenth Circuit Court of Appeals which is controlling in this jurisdiction.

In United States v. Lattauzio, 748 F.2d 559 (10th Cir. 1984), the Tenth Circuit held that the guarantors of a SBA loan had waived any defense to a commercially unreasonable sale by the contractual terms of the SBA Form 148 unconditional guaranty even if they could find that they were entitled to that defense under the applicable federal law. In reaching its holding, the Court referred to its prior ruling in United States v. Newton Livestock Auction Market, Inc., 336 F.2d 673 (10th Cir. 1964) where the Court stated:

> By the terms of the guaranty contracts SBA could have made an entire release of the security for the loan and still have recovered from the guarantors.

Id. at 677.

Since federal law applies, the provisions of the Utah Uniform Commercial Code are inapplicable. Nevertheless, even if Utah law applied, the Plaintiffs are not entitled to assert a defense under Utah Code Ann. §70A-3-606 (1980). That section only applies to discharge a party to the instrument. See, Utah Code Ann. §70A-3-606 (1980). See also, Uniform Commercial Code §3-606, Official Comment 1 (1962). The unconditional guaranties are separate independent contracts between Capital City and the Plaintiffs and do not come within the statutory definition of instrument. See, Utah Code Ann. §70A-3-102 and §70A-3-104. See also, American Security Bank v. Carno, 38 U.C.C.R. 1318, 1323, 151 Cal.App.3d 874, 199 Cal.Rptr. 127 (1984).

Even if Utah law were applicable, Capital City would not have a duty to liquidate the collateral before proceeding on the Note. The Utah Supreme Court has unequivocally established that the "one action rule" does not apply to personal property such as the collateral in this case and expressly permits a secured party to proceed with suit on the obligation without liquidation of the collateral. In Kennedy v. Bank of Ephraim, 594 P.2d 881 (Utah 1979) the Court held that a creditor "has an option to pursue any of the parties liable on this note, which is secured solely by personal property, and may also, at its option, ignore that security and satisfy its judgment from other property in the hands of the judgment debtor." Id. at 884.

The consent in the guaranty agreements under Utah law also constitutes an explicit written waiver of any defense which Plaintiffs might be able to assert even if the allegations of their complaint could be proved. The Utah Supreme Court addressed a waiver of the impairment defense in guaranty Agreements in Continental Bank and Trust Co. v. Utah Security Mortgage, Inc., 701 P.2d 1095 (Utah 1985) where the Court upheld the waiver by the guarantors and in affirming the trial court stated:

> We agree with the conclusion of the trial court that the language in the guaranty agreements is unambiguous and susceptible of only one

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interpretation: the guarantors explicitly waived any defense based on impairment of collateral. (emphasis added.)

Id. at 1098.

Plaintiffs have failed to establish an actionable breach of contract claim in their complaint based upon either federal or Utah law. Accordingly, Capital City is entitled to summary judgment dismissing with prejudice the Plaintiffs' first cause of action for breach of contract.

Point II

CAPITAL CITY HAS A PERFECTED SECURITY INTEREST IN THE COLLATERAL

The Plaintiffs' second cause of action alleges that Capital City breached its duty to perfect and maintain a security interest in the collateral. Capital City denies the allegations, maintains it has performed all of its obligations, and has a perfected security interest in the collateral. This cause also appears to be predicated upon Utah Code Ann. §70A-3-606 (1980) which has been previously demonstrated to be inapplicable. Nevertheless, for purposes of this motion, the allegations of the complaint are assumed to be true.

First, as set forth in Point I of this memorandum, the applicable Tenth Circuit law (or even if Utah law were applied) establishes that under the terms of the guaranties, Capital City has no duty to perfect or maintain a security interest in the collateral since the guarantors have explicitly waived that defense.

Second, it is established that Capital City currently has a perfected security interest in the collateral based upon the official records of the State of Utah - Division of Commercial Code directly contrary to the Plaintiffs' allegations. (Exhibit 12)

Third, no amendment of a financing statement is necessary, as asserted by Plaintiffs, when collateral is moved within the State of Utah. Both Park City and

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Salt Lake City are within the State of Utah, ergo, a new financing statement was not required when the collateral was moved. See, Utah Code Ann. §70A-9-401 and §70A-9-103 (1980). See also, Inter Mountain Assoc. of Credit Men v. Villager, Inc., 527 P.2d 664 (Utah 1974).

Fourth, Capital City denies that it has, at any time, released the collateral and no release is filed with the Secretary of State, pursuant to the provisions of Utah Code Ann. §70A-9-406 (Supp. 1986). See Exhibit 12. The affidavit of the duly authorized officer of Capital City (Exhibit 10) states that no authorized officer or person charged with responsibility for the Bagel Nosh loan has ever represented that Capital City did not have rights in the collateral. Furthermore, Plaintiffs' allegations are based upon Unsupportable hearsay.

Fifth, Plaintiffs have at all times been in control of Bagel Nosh and Powder Hound which entities had possession and control of the collateral including supervision of its movement. Plaintiffs have also had knowledge of the Crossroads Plaza legal proceeding which resulted in the execution sale (since Plaintiffs are co-defendants therein) and failed to take any action to protect the interests of that entity but instead permitted a default judgment to be entered against Powder Hound. Any decline in value or loss of the property would be the direct result of their own negligence and not that of Capital City. It follows, therefore, that the Plaintiffs' cause for loss of the collateral is untenable, and Capital City is entitled to summary judgment dismissing Plaintiffs' second claim with prejudice as a matter of law.

Point III

PLAINTIFFS' THIRD CAUSE OF ACTION FAILS TO STATE A CLAIM

Plaintiffs' third cause of action entitled "Change of Principal Obligation" avers that the March 30, 1983, Loan Restructure Agreement substantially modified the

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terms of the December 24, 1979, loan agreement discharging the Plaintffs, as guarantors, from their obligations. Plaintiffs do not allege that they did not have knowledge of the Loan Restructure Agreement nor can they. Sidney Seftel signed the document himself. Plaintiffs explicitly state in their complaint that they, as guarantors, made payments to Capital City pursuant to the terms of the Loan Restructure Agreement. Furthermore, Capital City maintains that the Plaintiffs expressly consented to the modifications and all modifications benefited the Plaintiffs.

The Loan Restructure Agreement was executed between Capital City, as Lender, and was signed by Sidney Seftel. Plaintiffs are guarantors of the corporate Note. The terms of the guaranties, as cited in Point I, supra, at page 8 of this memorandum explicitly grant Capital City authority "to modify or otherwise change any terms of all or any part" of the Note. Hence, an action cannot be asserted by Plaintiffs against Capital City since Plaintiffs have explicitly consented to the modifications in writing.

The only two real modifications to the Note are paragraph 7 and 8 of the Loan Restructure Agreement. Those two provisions: (1) reduce the monthly payment required under the Note from $5,557.50 per month to $4,000.00 per month, with certain exceptions, for a period of one year; and (2) reduce the interest rate by one-half of one percent. Both of those modifications benefited the guarantors since at the time of the modification the Note and both guaranties were in default (see Affidavit of M.A. Allem, Exhibit 13). Consequently, the guarantors averted collection of the Note from them pursuant to their guaranties in light of the Loan Restructure Agreement.

Plaintiffs have provided no legal basis to support their third cause of action. The cause appears to be predicated upon Utah Code Ann. §70A-3-606 (1980) as were Plaintiffs' first and second causes but that the impairment results from modification

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of the Note by the Loan Restructure Agreement. As previously set forth, any impairment claim has been expressly waived by the terms of the guaranties. United States v. Lattauzio, supra. See also, Continental Bank and Trust Co. v. Utah Security Mortgage, Inc., supra.

Without any legal basis to support Plaintiffs third cause of action and in light of Plaintiffs' express written waiver in their guaranties, Capital City is entitled to summary judgment with prejudice against Plaintiffs, dismissing their third cause of action.

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Point IV

PLAINTIFFS' CLAIMS ARE BARRED BY WAIVER, LACHES, AND ESTOPPEL

The Plaintiffs allege three causes of action. The first cause is predicated upon the alleged loss or impairment of collateral about February 1985. The second cause is similar to the first but alleges reckless loss of the security interest about February 1985. The basis for the third cause (the alleged change of the principal obligation) is the Loan Restructure Agreement executed March 30, 1983. As set forth in the affidavit of M.A. Allem, (Exhibit 13) no action, either formally or informally, was taken by the Plaintiffs complaining of the conduct of Capital City until the filing of the complaint in this action. The Plaintiffs, as Guarantors, made payments to Capital City from November 29, 1984, through December 27, 1985, on the Note of Bagel Nosh to Capital City in the sums specified in the Loan Restructure Agreement. All of the Plaintiffs' payments on the Note were after the occurrence of all of the events which form the basis of the Plaintiffs' three causes of action. Assuming arguendo the allged facts of the Plaintiffs' complaint to be true for purposes of this motion, their claims are barred by waiver, laches, and estoppel.

> A Waiver is the intentional relinquishment of a known right. To constitute a waiver, there must be an existing right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it. It must be distinctly made, although it may be express or implied . . .. To constitute waiver, one's actions or conduct must be distinctly made, must evince in some unequivocal manner an intent to waive and must be inconsistent with any other intent.

Hunter v. Hunter, 669 P.2d 430, 432 (Utah 1983) (citations omitted). In addition to the explicit written consent in the guaranty agreements which constitutes a waiver (discussed at Point I), the admitted conduct of the Plaintiffs in making payments on their obligations as guarantors following the default of Bagel Nosh and after each of the alleged actions for which Plaintiffs now claim entitlement to relief evidences clear and unequivocal conduct constituting a waiver of those rights, if any exist.

> [L]aches is contingent upon the establishment of two elements: (1) the lack of diligence on the part of plaintiff, and (2) an injury to defendant owing to such lack of diligence.

Leaver v. Grose, 610 P.2d 1262, 1264 (Utah 1980) (citations omitted). The facts establish that Capital City has established both of the requisite elements of a laches defense. Plaintiffs have not acted diligently in pursuing their rights, if any. Furthermore, since Plaintiffs are the principals, officers, and directors of Bagel Nosh and Powder Hound, they were aware of all the facts but failed to pursue any action either formally or even informally against Capital City. In short, the Plaintiffs' predicament directly results from the default of the corporations which they manage and control and not from the actions of Capital City.

Even if equipment was sold at execution sale, the Plaintiffs, as officers of Bagel Nosh and Powder Hound, could have directed Bagel Nosh, the Debtor, to pursue an action in Bankruptcy Court for the recovery of the equipment since it would have been seized and sold in violation of the automatic stay of the Bankrupty Code (11 U.S.C. §362). See, United States v. Whiting Pools, 462 U.S. 198, 103 S.Ct. 2309, 76

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L.Ed.2d 515 (1983); and In re Riding, 44 B.R. 846 (Bkrtcy.D.Utah 1984). Capital City does not have standing in Bankruptcy Court to assert that action. Hence, Capital City is prejudiced by the Plaintiffs' inaction and its own inability to pursue an action resulting from the automatic stay of 11 U.S.C. §362.

Finally, the conduct and actions of the Plaintiffs establish an estoppel to Plaintiffs' claims against Capital City.

> The doctrine of estoppel has application when one, by his acts, representations, or conduct, or by his silence when he ought to speak, induces another to believe certain facts exist and such other relies thereon to his detriment.

Id. (citations omitted).

Plaintiffs have conducted all of the affairs of Bagel Nosh and Powder Hound and, thus, were aware of all operations of Bagel Nosh and Powder Hound including the legal suits which were pending. Plaintiffs in their corporate capacities were responsible for the equipment and executed legal documents on behalf of the corporate entities. Plaintiffs knew of the March 30, 1983, Loan Restructure Agreement. In fact, one of the Plaintiffs, Sidney Seftel, signed the Loan Restructure Agreement. Sidney Seftel represented that the Plaintiffs consented to the modifications and would continue to guaranty the Note including providing personal financial statements. In addition, Plaintiffs allege in their complaint, that they have personally been paying for over one year on the obligations to Capital City pursuant to the terms of the Loan Restructure Agreement thereby benefiting therefrom. Certainly, Plaintiffs, having enjoyed the benefits, cannot now assert lack of knowledge and by their conduct have ratified terms of the Loan Restructure Agreement. Nor can Plaintiffs lay fault at the door of Capital City for any alleged loss of equipment when Plaintiffs have controlled all of the corporate entities, were privy to all agreements and legal proceedings, and have had sole ability, due to the bankruptcy, to enforce rights in

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the equipment. Capital City has relied upon the acts, conduct, and representations of the Plaintiffs to its detriment. Accordingly, Plaintiffs are estopped from asserting their claims against Capital City even if they could establish each and every allegation of their complaint which Capital City denies. Consequently, Capital City is entitled to summary judgment dismissing the Plaintiffs' causes of action with prejudice as being barred by waiver, laches, and estoppel.

Point V

CAPITAL CITY IS ENTITLED TO SUMMARY JUDGMENT ON ITS COUNTERCLAIM

Plaintiffs admit that the Note, Seftel Guaranty, Seftel Trust Deed, Landes Guaranty, and Landes Trust Deed are all genuine. Those instruments are all in default as established by the Affidavit of M.A. Allem. (Exhibit 13) Consequently, Capital City is entitled to Summary Judgment on its counterclaim against Seftel and Landes. for the balance due on the Note and foreclosing Capital City's interest in the real property. Thus, Capital City need only address its motion against the other counterclaim defendants.

The Seftel Trust Deed and Landes Trust Deed were both executed on December 24, 1979. The interest of the Utah State Tax Commission by virtue of its tax warrant is inferior to the interests of Capital City since it was entered on February 3, 1984, more than four years subsequent to the recordation of the Seftel Trust Deed and Landes Trust Deed. Furthermore, the Utah State Tax Commission (served on April 3, 1986) has failed to file an answer or other responsive pleading in this proceeding. Therefore, it is proper for Summary Judgment to be granted against the Utah State Tax Commission declaring its rights to be inferior to the interests of Capital City in the real property of Seftel and Landes.

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The interest of Crossroads Plaza Associates (hereinafter "Crossroads") was alleged by virtue of a judgment according to the foreclosure report received from a title company. Crossroads, however, does not have a judgment lien on the real property subject to either the Seftel Trust Deed or Landes Trust Deed since the judgment is only against Powder Hound (Exhibit 10). Hence, summary judgment may be granted declaring the interests, if any, of Crossroads to be inferior to the interests of Capital City.

The interest of Young Electric Sign Company (hereinafter "YESCO") is by virtue of a default judgment against Sidney Seftel entered February 20, 1985, more than five years subsequent to recordation of the Seftel Trust Deed. Thus, the interest of YESCO in the real property subject to the Seftel Trust Deed is inferior to the interest of Capital City which is entitled to summary judgment against YESCO declaring the rights of YESCO to be inferior to the interest of Capital City. YESCO has no interest in the real property subject to the Landes Trust Deed. Accordingly, this Court may grant summary judgment declaring the interest of YESCO, if any, subject to the Landes Trust Deed to be inferior to the interests of Capital City.

Olympus Hills Shopping Center, Ltd. (hereinafter "Olympus"), does not currently have an outstanding judgment lien on the real property of either Seftel or Landes according to the affidavit of its authorized partner (Exhibit 16). Hence, Capital City is entitled to summary judgment declaring the interest of Olympus to be inferior to the interests of Capital City.

Based upon the foregoing, Capital City is entitled to Summary Judgment against each of the three Plaintiffs for the balance owed plus interest, costs, and attorneys' fees and directing the Sheriff to execute upon the real property in order to foreclose the Seftel Trust Deed and the Landes Trust Deed, and declaring that the interests

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of the Utah State Tax Commission, Crossroads, YESCO, and Olympus are inferior to the interests of Capital City.

CONCLUSION

There being no genuine issues of material fact, Capital City is entitled to summary judgment against Plaintiffs on its counterclaim as prayed and is also entitled to summary judgment against Plaintiffs dismissing all of their causes of action against Capital City dismissing with prejudice. Capital City is also entitled to summary judgment declaring the interests of the Utah State Tax Commission, Crossroads, Olympus, and YESCO to be inferior to the interests of Capital City in the real property subject to the Seftel Trust Deed and the Landes Trust Deed.

Respectfully submitted this 21 day of July, 1986.

WATKISS & CAMPBELL

Steven T. Waterman
Attorneys for Capital City Bank

WATKISS & CAMPBELL
ATTORNEYS AT LAW
TWELFTH FLOOR, 310 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101-2171

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 1986, I served the foregoing Capital City Bank's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment and Exhibits to Capital City Bank's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment upon the following by depositing copies thereof in the United States mail, postage prepaid, addressed as follows:

Daniel W. Jackson
JACKSON & WILKINSON
Arrow Press Square, Suite 200
165 South West Temple
Salt Lake City, Utah 84101

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Kent W. Larsen
Thomas B. Green
LARSEN, KIMBALL, PARR & CROCKETT
185 South State, Suite 1300
Salt Lake City, Utah 84111

Neil B. Smith
P.O. Box 25728
336 South 400 West
Salt Lake City, Utah 84125

Utah State Tax Commission
David Wilkinson, Attorney General
23 State Capitol Building
Salt Lake City, Utah 84114

Douglas Mortenson
MATHESON, JEPPSON & MORTENSON
658 East 180 South
Salt Lake City, Utah 84102

ATTORNEYS AT LAW
TWELFTH FLOOR, 310 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101-2171

DANIEL W. JACKSON (1633)
JEFFREY W. WILKINSON (3754)
JACKSON & WILKINSON
Arrow Press Square, Suite 200
165 South West Temple
Salt Lake City, UT 84101
Telephone (801) 328-1800

IN THE THIRD JUDICIAL DISTRICT COURT

OF SALT LAKE COUNTY, STATE OF UTAH

SIDNEY SEFTEL, THERESA SEFTEL, and MICHAEL LANDES Plaintiffs, vs. CAPITAL CITY BANK, a Utah Corporation Defendant.	MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT Civil No. C86-1810

Plaintiffs by and through their counsel of record respectfully submit the following Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment.

STATEMENT OF CONTESTED FACTS

1. Plaintiffs dispute paragraphs 6 and 8 of Defendant's Statement of Uncontested Facts, that Plaintiffs executed personal guaranties of the "Note in favor of Capital City." In fact, the guaranty runs to both Capital City and the

SBA as coguarantors with the SBA acting as a participatory lender in the loan in the amount of 90%. See Paragraph 11 of Affidavit of M.A. Allen. The guaranties are not in favor of Capital City, but is in favor of the SBA to the extent of 90% of the unpaid balance of the note.

2. Plaintiffs dispute Paragraph 10 of Defendant's Statement of Uncontested Facts. Defendants omitted to provide the relevant language from the SBA Form 148 guarantee. More specifically, the final clause of the fifth full paragraph of the guaranty. That clause states:

> The obligations of the Undersigned hereunder, and the rights of Lender in the collateral, shall not be released, discharged or in any way affected, nor shall the Undersigned have any rights against Lender: by reason of the fact that any of the collateral may be in default at the time of acceptance thereof by Lender or later; nor by reason of the fact that a valid lien in any of the collateral may not be conveyed to, or created in favor of Lender; nor by reason of the fact that any of the collateral may be subject to equities or defenses or claims in favor of others or may be invalid or defective in any way; nor by reason of the fact that any of the Liabilities may be invalid for any reason whatsoever; nor by reason of the fact that the value of any of the collateral, or the financial condition of thd Debtor or of any obligor or guarantor of any of the collateral, may not have been correctly estimated or may have changed or may hereafter change; nor by reason of any deterioration, waste or loss by fire, theft, or otherwise of any of the collateral, unless such deterioration, waste or loss be caused by the willful act or willful failure to act of Lender.

This clause provides that the obligation of the guarantors is discharged if deterioration, waste or loss of the collateral pledged to secure the indebtedness is caused by the willful acts

or willful failure to act of Capital City. Plaintiffs have alleged that the very cause of the loss of the collateral was through the willful and reckless acts of Capital City Bank which resulted in the loss of the collateral pledged. See paragraph 25 of Plaintiffs' Complaint. See also Defendant's response to Plaintiffs' Request for Admission No. 3, wherein the Defendant admits that it had actual notice that the Park City Bagel Restaurant on or about October 31, 1981 closed.

3. Plaintiffs dispute paragraph 12 of Defendant's Statement of Uncontested Facts. Sidney Seftel as an individual, was not a party to the Loan Restructure Agreement. Neither of the guarantors were parties to the Loan Restructure Agreement. The only parties to the Loan Restructure Agreement are Capital City and the Bagel Nosh.

4. Plaintiffs dispute paragrapn 19 of Defendant's Statement of Uncontested Facts that Capital City has maintained a perfected security interest in all equipment, machinery and personal property of Bagel Nosh. In fact, most of the Bagel Nosh equipment was sold in February of 1985 pursuant to a landlord's lien and is lost and beyond any recovery by the guarantors of Bagel Nosh. Capital City did not take any action to assert their superior claim over the Landlord to the equipment or to prevent the loss of the equipment. Capital City willfully allowed the equipment to be lost, thus prejudicing the

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guarantors' rights.

5. Plaintiffs dispute paragraph 20 of Defendant's Statement of Uncontested Facts. Agents of Capital City represented to agents of Crossroads Plaza, the Landlord that seized the equipment and sold it, prior to any sale, that Capital City did not have any interest in equipment at that location.

6. Plaintiffs dispute paragraph 21 of Defendant's Statement of Uncontested Facts that the Note, Seftel Guaranty, Seftel Trust Deed, Landes Guaranty, Landes Trust Deed and Loan Restructure Agreement are all in default. Plaintiffs dispute that they have any obligation to Capital City Bank. On March 30, 1983, a Loan Restructure Agreement was entered into which altered the terms of the original obligation. See Defendant's response to Request No. 10 of Plaintiffs' Request for Admissions.

7. Genuine issues of material fact exist regarding liabilities under the Loan Restructure Agreement. Questions exist as to the parties to the Agreement, the materiality of the alteration of the obligations, and the effect of the Loan Restructure Agreement upon the prior guaranties.

8. A genuine issue of material fact exists with regard to the real party in interest with the right to enforce

the SBA guaranties. Paragraph 11 of the Affidavit of M.A. Allen states that the SBA is a participatory lender to the extent of 90% of the unpaid balance. The SBA is the real party in interest to prosecute an action to enforce said guaranties.

ARGUMENT

ISSUES OF FACT ARE PRESENT CONCERNING THE DEFENDANTS' WILLFUL LOSS OF THE COLLATERAL

Under applicable law, summary judgment may not be granted when it appears from the record and pleadings on file that any genuine issues of material fact exists in relation to any cause of action advanced by the party against which judgment is sought. In the present case, the Plaintiffs herein alleged that Defendant Capital City Bank has breached its contract with them by allowing certain collateral to be converted by a third party creditor.

In defense of those allegations and in support of its motion for summary judgment, Defendant Capital argues that under the form of the guarantee that was initially executed by the Plaintiffs, they have expressly waived any defenses to a commercially unreasonable sale of the collateral which was pledged to secure the obligation. In addition, Defendant argues that the Utah Supreme Court has recognized the unilateral waiver by guarantors of an impairment of collateral defense.

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The guarantee originally executed by the Plaintiffs contains extensive language concerning the waiver of certain rights by the guarantors. That language however is conditioned by the statement found in the fifth full paragraph which states:

> The obligations of the Undersigned hereunder, and the rights of Lender in the collateral, shall not be released, discharged or in any way affected, nor shall the Undersigned have any rights against Lender: by reason of the fact that any of the collateral may be in default at the time of acceptance thereof by Lender or later; nor by reason of the fact that a valid lien in any of the collateral may not be conveyed to, or created in favor of Lender; nor by reason of the fact that any of the collateral may be subject to equities or defenses or claims in favor of others or may be invalid or defective in any way; nor by reason of the fact that any of the Liabilities may be invalid for any reason whatsoever; nor by reason of the fact that the value of any of the collateral, or the financial condition of thd Debtor or of any obligor or guarantor of any of the collateral, may not hve been correctly estimated or may have changed or may hereafter change; nor by reason of any deterioration, waste or loss by fire, theft, or otherwise of any of the collateral, unless such deterioration, waste or loss be caused by the willful act or willful failure to act of Lender.

The final clause of that paragraph provides that the obligation of the guarantors may be discharged or reduced if any deterioration, waste or loss of collateral pledged to secure the indebtedness is caused by the willful acts or willful failure to act of the Capital City Bank. In its memorandum in support of its motion for summary judgment, Defendant fails to acknowledge this distinction and the resulting limit on the guarantor's alleged waiver.

In its complaint, Plaintiffs have alleged that the willful failure of the Defendants to act has resulted in the entire loss of the collateral which was originally pledged by the debtor to secure the indebtedness. The Defendant's willful failure to act includes but is not limited to its failure to contest or otherwise defend the collateral which it alleges it has a security interest in from the conversion of that property by the debtor's lessors.

The willful failure of the Defendants to prevent the conversion of the collateral in question falls squarely within the "deterioration" clause of the guaranty agreement and is distinct from the lender's failure to perfect a lien on the collateral. In United States v. Abbruzzese, 553 F.Supp. 11 (E.D. Mich. 1982), the court presented a detailed explanation of the difference between the general waiver language found on SBA Form 148 which is relied upon by Defendants as the basis of this waiver argument and the deterioration clause. As the court in Abbruzzese explained:

> A reasonable and harmonious reading of the guarantee as a whole suggests that the two clauses take their meaning from one another, that the former clause applies to the failure to perfect a lien, and that the latter be restricted to those occurrences of physical damage suggested by the words "or loss by fire, theft or otherwise." Id. at 13.

In Abbruzzese, the court went on to rule that their interpretation of the guaranty language was consistent with the tenth circuit holding in the Joe Huston Tractor & Implement Co. v. Securities Acceptance Corp., 243 F.2d 196 (10th Cir. 1957) because the deterioration clause was not at issue in that case[1] See also United States v. Willis, 593 F.2d 247, 255 (6th Cir. 1979).

However, the unique facts of the present case involving the total loss of the property by means of its conversion by the lender places in issue the deterioration clause and genuine issues of material fact regarding the Defendants willful failure to act. Because the property in question has been lost by the Defendant's willful failure to act additional questions of fact arise concerning the fair market value of the property and the resulting extent of the release or discharge of the guarantors.

These questions of material fact render summary judgment inappropriate and require the denial of the Defendant's present motion.

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[1]In Joe Huston Tractor & Implement Co. v. Securities Acceptance Corp., the Tenth Circuit held that a lender's failure to file a lien in accordance with state law, or collateral given as security for an unconditional guaranty, does not discharge the guarantor from liability on the guaranty. This position formed the basis of that court's holding in United States v. Newton Livestock Auction Market, Inc., 336 F.2d 675 (10th Cir. 1964) which is alleged by Defendants in support of their waiver argument.

On March 30, 1983, the debtor, Bagel Nosh Intermountain Ltd. Inc., and the Defendant executed a loan agreement which materially changed the terms of the original obligation between those parties by extending the term of the repayment of the loan by reducing the monthly payments. The Defendants have presented no evidence that the original guarantors consented to the alterations contained in the loan restructure agreement or subsequently executed new guarantees relating to the indebtedness.[2]

Under the generally accepted view, a material alteration in the contract between the creditor and the principal made after the execution of the guarantee discharges the guarantor. See Federal Deposit Ins. Corp. v. Manion, 712 F.2d 295, 297 (7th Cir. 1983); Tomlin v. Ceres Corporation, 507 F.2d 182 (10th Cir. 1967); Sander v. Dittmar, 118 F.2d 524 (10the Cir. 1941); Depositors Trust Co. v. Hudson General Corp., 485 F.Supp. 1355 (E.D.N.Y. 1980).

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[2]Paragraph 5 of the Restructure Agreement provides as a condition to that agreement, that Sidney Seftel and Michael Landes personally guarantee the Bank's loan to the borrower. No guarantees were ever executed by the Plaintiffs following the execution of this agreement. Utah Code Ann. 25-5-4 requires that every promise to answer for the debt, default or miscarriage of another shall be void unless some agreement, on note or memorandum thereof, in writing, subscribed by the party to be charged therewith. Therefore, if the Plaintiffs' obligations are discharged by the alteration of the original guarantee, they are not subsequently liable to the Defendant.

The Defendants concede that an agreement materially altering the terms of the original contract with the debtor and the Defendant does not allege that the Plaintiffs, in their individual capacities consented to the Restructure Agreement.

However they argue that the terms of the SBA Form 148 expressly authorized them to modify or otherwise change any terms of all or any part of the note and therefore the Plaintiffs have implicitly consented to the modifications.

However when the two documents are viewed together (the original guarantee and the restructure agreement) they appear to be in direct conflict and cause an express ambiguity. Specifically, the SBA Form 148 which was executed by the Plaintiff jointly guarantees the Defendants and SBA as co-lenders. In fact, in the Affidavit of M.A. Allen, an executive vice-president of Capital City Bank, he states under oath that SBA is a participating lender in the loan of Capital City to Bagel Nosh to the extent of ninety percent (90%) of the outstanding loan balance. (See Affidavit M.A. Allen, para. 11 which was attached to Defendants' Memorandum as Exhibit 13).

Yet in contradiction to this fact, the loan restructure agreement is allegedly conditioned upon the acceptance of its terms by the SBA and that subsequent personal guarantees will be executed by Sidney Seftel and Michael Landes in which each will

be personally liable for the future indebtedness to the Bank. If the Restructure Agreement is binding upon all parties, it constitutes a release and settlement of the guarantors' obligations under the original guarantee. This interpretation of the meaning and effect of that document is mandated by the rule of law that requires that the documents in question be strictly construed against the Defendant . See Depositors Trust Co. v. Hudson General Corp., 485 F.Supp. 1355, 1361 (E.D.N.Y. 1980).

The inherent ambiguities found in these documents and their relationship and effect on each other create genuine issues of material fact which cannot be resolved through summary proceedings but rather require a full trial before a trier of fact. Therefore, the Defendant's motion for summary judgment must be dismissed and the matter be allowed to go forward to trial.

CAPITAL CITY HAS FAILED TO JOIN AN INDISPENSIBLE PARTY IN THE LITIGATION AND THEREFORE ITS COUNTERCLAIM MUST BE DISMISSED

Defendant Capital City argues in Point V of its Memorandum in Support of its Motion for Summary Judgment that because various instruments all in default, it is entitled to summary judgment on its counterclaim against Plaintiffs. The arguments presented above which detail the various questions of

fact and law which are in dispute regarding the parties' liability under the guaranties established that summary judgment is not appropriate in the present case.

In addition to the various issues of material fact that exist, summary judgment should not be granted to the Defendants because they have failed to join an indispensible party in their counterclaim. The Plaintiffs' liability to Defendants if it exists at all would have to be based on the written guaranties which they executed of December of 1979. Those guaranties (copies of which are attached as Exhibit 4 and 6 to the Defendant's memorandum) show that Capital City and the SBA act as co-lenders or partners in the transaction in question. The existence of a joint action and an implicit partnership in the loan in question is affirmed by M.A. Allen when he explains in his deposition, submitted in support of Defendants' motion, that the SBA is a participating lender in the loan of Capital City to Bagel Nosh to the extent of ninety percent (90%) of the outstanding unpaid balance (Affidavit M.A. Allen para. 11).

Notwithstanding the fact that Capital City Bank and the SBA were co-lenders in relation to underlying obligation, the Defendant has brought this counterclaim in its name alone and is seeking a judgment from the Plaintiffs of the total balance due on the note and the right to foreclose its interest

in certain real property pledged by Plaintiffs. Courts universally hold that an individual partner may not sue in his own name to enforce a liability owed to a partnership and one partner's failure to join all partners as plaintiffs is grounds for dismissal as lack of necessary parties under Rule 19(a) Utah Rules of Civil Procedure. Kemp v. Murray, 680 P.2d 758 (Utah 1984).

The requirements of Rule 19(a) seek to protect the interest of judicial economy and fairness to the party litigants. By requiring joinder of necessary parties, Rule 19(a) protects the interest of the parties who are present by precluding multiple litigation and contary claims over the same subject matter as the original litigation. See Kemp v. Murray, 680 P.2d 760; Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, 456 F.Supp. 831, 836 (D. Del. 1978).

If the guarantees are enforceable, the Plaintiffs would be liable to both the Defendant and the SBA for a portion of the principal amount of the loan. Where rights sued upon arise from a contract, such as the guarantee agreements, all parties to the contract must be joined. Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, 456 F.Supp. at 836 footnote 7. In the present action the SBA, a co-obligee under the terms of the contract, has not been joined as a party by the counterclaim Plainitff.

Because this indispensible party has not been joined the Defendant's motion for summary judgment must be denied and the counterclaim dismissed.

COUNTERCLAIM PLAINTIFFS ARE LIMITED TO TEN PERCENT OF THE OUTSTANDING LIABILITY AND ANY RECOVERY MAY NOT EXCEED THAT AMOUNT

In its motion for summary judgment, Defendant as counterclaim Plaintiff seeks an award of damages in the full amount of the balance due on the note. However, the evidence submitted by Defendant in support of its motion establishes that the SBA provided ninety percent (90%) of the monies originally loaned to Bagel Nosh pursuant to the note and that the guaranties which form the only basis for the alleged eprsonal liability of the Plaintiffs runs to both Capital Cities and the SBA.

In a breach of contract action such as the prsent counterclaim, the purpose or objective in awarding damages is to fully recompense the non-breaching party for its losses sustained because of the breach. See Harris v. St. Paul Fire & Marine Ins. Co., 683 P.2d 440 (Idaho App. 1984). The insured party should be placed in a position no better and no worse than he would have occupied had the contract been performed. Christensen v. Christensen, 605 P.2d 80, 83 (Idaho 1979).

Adherence to these general rules for assessing damages for breach of contract require that the counterclaim Defendnat may receive no more than ten percent (10%) of the unpaid balance of the note plus interest on that amount.

CONCLUSION

Capital City Bank is not the real party in interest under the guaranties in question and must be denied summary judgment.

Genuine issues of material fact exist which preclude the entry of summary judgment, and Capital City Bank is not entitled to summary judgment as a matter of law.

Dated this 21st day of August, 1986.

Daniel W. Jackson

CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 21 day of August, 1986, I hand delivered a true and correct copy of the foregoing document to:

Steven Waterman
WATKISS & CAMPBELL
310 South Main Street, #1200
Salt Lake City, Utah 84101

Herschel J. Saperstein (2861)
Steven T. Waterman (4164)
WATKISS & CAMPBELL
310 South Main, Suite 1200
Salt Lake City, Utah 84101
Telephone: (801) 363-3300

Attorneys for Defendant. Capital City Bank

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

SIDNEY SEFTEL, THERESA SEFTEL, and MICHAEL LANDES, Plaintiffs, vs. CAPITAL CITY BANK, a Utah corporation, Defendant.	Civil No. C86-1810 (Judge Hanson)
CAPITAL CITY BANK, a Utah corporation, Counterclaimant, vs. SIDNEY SEFTEL, THERESA SEFTEL, MICHAEL LANDES, UTAH STATE TAX COMMISSION, CROSSROADS PLAZA ASSOCIATES, a Utah joint venture and general partnership, YOUNG ELECTRIC SIGN COMPANY, a Utah corporation, and OLYMPUS HILLS SHOPPING CENTER, LTD., a Utah limited partnership, Counterclaim Defendants.	**CAPITAL CITY BANK'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

ATTORNEYS AT LAW
TWELFTH FLOOR, 310 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101-2171

Capital City Bank (hereinafter "Capital City"), by and through its counsel, Watkiss & Campbell, files this memorandum in reply to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment and pursuant to leave of this Court granted by the Honorable Scott Daniels pursuant to an Order dated October 2, 1986, which also continued the hearing in this matter to October 27, 1986, at 2:30 p.m. Plaintiffs (Sidney Seftel, Theresa Seftel, and Michael Landes) may be referred to herein collectively as "Guarantors."

WATKISS & CAMPBELL
ATTORNEYS AT LAW
TWELFTH FLOOR, 310 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101-2171

ADDITIONAL MATERIAL FACTS

1. Capital City is the holder of all loan instruments relating to the Bagel Nosh loan including the Note executed by Bagel Nosh in favor of Capital City on December 24, 1979 (Exhibit 1 to Capital City's Memorandum), and the guaranty agreements of even date executed by each of the Guarantors. [Supplemental Affidavit of M.A. Allem previously filed with this Court and a copy of which is attached hereto as Exhibit 17]

2. The Guarantors have admitted that they are personally liable on the Note in favor of Capital City and that the guaranties have continuing effectiveness in the "Disclosure Statement by Proponents of the Reorganization Plan" dated October 8, 1985, which includes the "Plan of Reorganization by Proponents" dated October 8, 1985, which they have filed in the Bagel Nosh bankruptcy proceeding and certified copies of which are attached hereto as Exhibit 18.

ARGUMENT

The Guarantors are the only parties responding in writing to Capital City's Motion for Summary Judgment. They assert that genuine issues of material fact exist precluding the availability of summary judgment. The Guarantors' memorandum asserts three points comprising four issues which are: (1) factual issues exist relative

to Capital City's willful loss of the collateral; (2) Modification of the Note discharged the Guarantors; (3) Capital City failed to join an indispensable party; and (4) Capital City's recovery should be limited to Capital City's participation in the Note. Each of the issues is addressed herein.

POINT I

THE GUARANTORS ADMIT THE CONTINUING VITALITY OF THEIR GUARANTIES

The Guarantors have alleged that actions of Capital City on or about October 31, 1981, and in February 1985, discharged their liabilities under the guaranties. However, the legal documents filed by the Guarantors in the Bagel Nosh bankruptcy proceeding in referring to payment of Capital City explicity state that Capital City will be "retaining the personal guarantors on the loan." See, Disclosure Statement by Proponents of the Reorganization Plan, p. 26 (attached as Exhibit 18). That document is dated October 8, 1985, and signed by counsel for the Guarantors. Thus, the liability has been expressly admitted or there has been an express waiver or consent to any modifications in addition to all other arguments previously advanced by Capital City.

POINT II

NO GENUINE ISSUE OF FACT EXISTS

The Guarantors concede the applicability of federal law to this action. In order to ascertain if a genuine issue of material fact exists the law of the Tenth Circuit Court of Appeals must be applied.

To support their position, the Guarantors rely primarily upon dictum in United States v. Abbruzzese, 553 F.Supp. 11, 13 (E.D.Mich.1982) interpreting the "deterioration clause" of the Form 148 guaranty. That Court states its opinion that its interpretation

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TWELFTH FLOOR, 310 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101-2171

of the "deterioration clause" is consistent with the holding of the Tenth Circuit in Joe Heaston Tractor & Implement Co. v. Securities Acceptance Corp., 243 F.2d 196 (10th Cir. 1957) upon which case the Guarantors also rely. However, the Joe Heaston Tractor case did not deal with a Form 148 guaranty. Nor have the Guarantors cited any authority where any court has ruled against the lender under a Form 148 guaranty.

Furthermore, after the 1982 Abbruzzese opinion, the "deterioration clause," now relied upon by the Guarantors, has been interpreted by the Tenth Circuit earlier this year in United States v. New Mexico Landscaping, Inc., 785 F.2d 843 (10th Cir. 1986). The Tenth Circuit stated:

> Therefore, in order to establish a 'willful act or willful failure to act,' by the [lender] under the guaranty agreement, a guarantor must allege **more** than 'gross neglect of a known duty.' **A guarantor seeking to establish 'willfulness' under this guaranty agreement must allege 'a purpose by the [lender] to diminish the value of the security in order to intentionally injure the [guarantors].'** 785 F.2d at 848 (citation omitted) (emphasis added).

The Tenth Circuit's language is dispositive of this case.

No allegation of the complaint alleges any purpose by Capital City "to diminish the value of the security in order to intentionally injure" the Guarantors. Indeed, any allegation of that nature is highly improbable since the alleged loss arises from execution on a default judgment against a corporation (in which the Guarantors are the principals) which judgment arose from a suit in which the Guarantors were co-defendants and who chose to answer the complaint on their own behalves but permitted a default judgment to be entered against their corporation. Having failed to set forth any allegations and provide any evidence of the "willfulness" requirement, summary judgment against the Guarantors is appropriate. Accordingly, the Guarantor's causes of action should be dismissed with prejudice.

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ATTORNEYS AT LAW
TWELFTH FLOOR, 310 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101-2171

POINT III

THE GUARANTORS EXPRESSLY CONSENTED TO MODIFICATION OF THE NOTE

The Guarantors persist in their assertion that material modifications in the Note discharged their obligations although their argument is in their memorandum under the heading relative to willful loss of the collateral. At page nine (9) of their memorandum, the Guarantors allege material alterations were made to the Note, including extension of the term, without the consent of the Guarantors. However, there was NO extension of the terms of the loan. The alterations were a reduction of both the interest rate and the monthly payment. Further, on page ten (10) of their memorandum, the Guarantors suggest in a non-sensical phrase that Capital City has conceded some point and that there is no allegation that the Guarantors, in their individual capacities, consented to any alterations.

To be clear, Capital City has not conceded anything. Further, Capital City reiterates its position stated in Point II at page fourteen (14) of its memorandum in support of its motion for summary judgment and emphatically articulates that the Guarantors, in their individual capacities, expressly consented in the guaranty agreements to any and all modifications to the Note thereby waiving any and all rights which they might have been able to assert.

Capital City also has provided additional information and argument which (as the Guarantors have recognized) supports a position that notwithstanding the express waiver there has been an implicit consent to the modifications or waiver of their rights. See also Point I, supra.

Two of the cases cited by the Guarantors with reference to the alterations are inapposite. Sauder v. Dittmar, 118 F.2d 524 (10th Cir. 1941) is an old Tenth Circuit opinion which does not even deal with guaranties. Tomlin v. Ceres, 507 F.2d 642

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(5th Cir. 1975), states that a material alteration of the principal note will discharge a guarantor but does not address a specific waiver by the guarantor which is the issue in this case.

The other two cases relied upon the Guarantors actually support the position of Capital City. In Depositors Trust Co. v. Hudson General Corp., 485 F.Supp. 1355 (E.D.N.Y. 1980), the guaranty specifically required the lender to give notice to the guarantor of any modification and to obtain his consent thereto. The lender failed to give notice or obtain the guarantors consent. Thus, the guarantor was discharged of his liability. Notice is specifically and expressly waived in the guaranty agreements executed by the Guarantors and which are at issue before this Court.

Finally, F.D.I.C. v. Manion, 712 F.2d 295 (7th Cir. 1983), involved a guaranty in which the guarantor expressly consented to modifications of the principal note but also provided a means for the guarantor to revoke his continuing guaranty. After revocation of the guaranty, the lender extended the Note and after default sought to recover from the guarantor. The Court's opinion acknowledges that a consent in the guaranty waives the guarantor's right to object to a modification or alteration. In that particular case the alteration occurred after revocation, effectively discharging the guarantor since the Court interpreted the waiver to apply only to extension or modification of the Note prior to revocation of the guaranty. Implicit in the Seventh Circuit's reasoning is if the extension had occurred prior to revocation of the guaranty, the guarantor would have remained liable since the guaranty agreement waived the rights of the guarantor.

In this case, the Guarantors have explicitly consented to the modifications. The guaranties state that the Guarantors grant:

> [T]o Lender full power, in its uncontrolled discretion and without notice . . . to deal in any manner with the liabilities and the collateral, including, but without limiting the generality of the foregoing, the following powers:

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TWELFTH FLOOR, 310 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101-2171

(a) To modify or otherwise change any terms of all or any part of the liabilities or the rate of interest thereon . . . to grant any extension or renewal thereof . . . and to effect any release, compromise, or settlement with respect thereto.

There is no provision in the guaranties for revocation as in the Manion case relied upon by the Guarantors. If the Manion court had been faced with the facts of this case, it is apparent that the guarantors would not have been discharged since the guaranty agreements provide an explicit consent to the modification of the Note without notice.

POINT IV

SBA IS NOT AN INDISPENSABLE PARTY

The Guarantors last two arguments are that the SBA is an indispensable party having a ninety percent (90%) interest in the Note and guaranties, and, therefore, Capital City's recovery should be limited to ten percent (10%) of the outstanding balance. Those arguments are meritless.

The general law concerning a party in interest is not available in the context of negotiable instruments nor is the relationship between SBA and Capital City a partnership as the Guarantors assert. The holder of a negotiable instrument has the right to sue on the note regardless of actual ownership. See, Utah Code Ann. §70A-3-301 (1980). The obligor under the instrument is protected when the holder of the instrument is paid since payment to the holder discharges the obligation. See. Utah Code Ann. §70A-3-603 (1980). In this case, Capital City is the holder of the legal instruments, is entitled to collect the Note through suit or otherwise, and is entitled to recovery thereon.

Furthermore, a participant to a loan is not an indispensable party since its claims are only against the note holder (lead lender) as to its pro rata portion of the proceeds and does not have a direct claim against the obligor. Hibernia National

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SALT LAKE CITY, UTAH 84101-2171

Bank v. F.D.I.C., 773 F.2d 1403, 1407 (10th Cir. 1984). The interest of SBA is not even a participation. SBA has agreed to participate in the loan to the extent of ninety percent (90%) of the outstanding debt when certain conditions are satisfied. The loan was fully funded by Capital City, and SBA has not yet purchased any portion of the debt. Consequently, the interest of SBA is only as a potential participant, and at this point, SBA is not entitled to any proceeds to be recovered.

All parties necessary to a complete resolution of the issues before this Court have been joined. Capital City, as the holder of the instruments, is entitled to summary judgment for the full amount of the outstanding obligation plus applicable costs including attorneys' fees incurred.

CONCLUSION

Capital City has met its burden of establishing that no genuine issue of material fact exists under the applicable law. Accordingly, this case is ripe for summary judgment which should be entered in favor of Capital City and against each of the Counterclaim Defendants including Plaintiffs.

RESPECTFULLY SUBMITTED this 3 day of October, 1986.

WATKISS & CAMPBELL

Steven T. Waterman
Attorneys for Capital City Bank

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 1986, I served the foregoing Capital City Bank's Reply Memorandum of Points and Authorities in Support of its Motion for Summary Judgment upon the following, by depositing copies thereof in the United States mail, postage prepaid, addressed as shown below:

WATKISS & CAMPBELL
ATTORNEYS AT LAW
TWELFTH FLOOR, 310 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101-2171

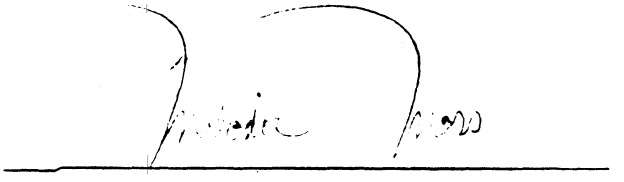
Daniel W. Jackson
JACKSON & WILKINSON
Arrow Press Square, Suite 200
165 South West Temple
Salt Lake City, Utah 84101

Kent W. Larsen
Thomas B. Green
LARSEN, KIMBALL, PARR & CROCKETT
185 South State, Suite 1300
Salt Lake City, Utah 84111

Neil B. Smith
P.O. Box 25728
336 South 400 West
Salt Lake City, Utah 84125

Utah State Tax Commission
Mary Beth Walls, Assistant Attorney General
23 State Capitol Building
Salt Lake City, Utah 84114

Douglas Mortenson
MATHESON, JEPPSON & MORTENSON
658 East 180 South
Salt Lake City, Utah 84102



ATTORNEYS AT LAW
TWELFTH FLOOR, 310 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101-2171